

# PRESIDENTIAL OBSTRUCTION OF JUSTICE

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*Federal obstruction of justice statutes bar anyone from interfering with law enforcement based on a “corrupt” motive. But what about the president of the United States? The president is vested with “executive power,” which includes the power to control federal law enforcement. A possible view is that the statutes do not apply to the president because if they did they would violate the president’s constitutional power. However, we argue that the obstruction of justice statutes are best interpreted to apply to the president, and that the president obstructs justice when his motive for intervening in an investigation is to further personal, pecuniary, or narrowly partisan interests, rather than to advance the public good. A brief tour of presidential scandals indicates that, without anyone noticing it, the law of obstruction of justice has evolved into a major check on presidential power.*

## INTRODUCTION

Can a president be held criminally liable for obstruction of justice? That question took on new urgency in the wake of President Donald Trump’s firing of FBI director James Comey in May 2017. While the president cited Deputy Attorney General Rod Rosenstein’s determination that Comey had mishandled the investigation into Hillary Clinton’s disclosure of classified emails, Trump later admitted in an interview that he “was going to fire [Comey] regardless of the recommendation.” Because Trump had also signaled to Comey that he was unhappy with the FBI’s investigation of former National Security Advisor Michael Flynn, speculation arose that Trump had fired Comey to punish him for failing to drop the investigation of Flynn. This in turn sparked allegations that Trump had committed the crime of obstruction of justice, which consists of interference with investigations,

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prosecutions, and other law enforcement actions with “corrupt” intent.<sup>1</sup>

President Trump was not the first president to be accused of obstruction of justice. The first article of impeachment against President Richard Nixon, which was adopted by the House Judiciary Committee in 1974, accused him of obstructing the investigation into the Watergate burglary by interfering with an FBI investigation.<sup>2</sup> The article also mentioned interference with the investigation by the Watergate special prosecutor, whose firing was ordered by Nixon.<sup>3</sup> High-ranking Reagan administration officials were indicted on obstruction of justice charges related to the Iran-Contra affair, and several of President Reagan’s opponents suggested that he may have committed obstruction as well (though those allegations were never proven).<sup>4</sup> After President George H.W. Bush pardoned former Defense Secretary Caspar Weinberger, who was one of the Reagan administration officials charged with obstruction in the Iran-Contra scandal, Bush was accused of obstructing the investigation into his own role in the scandal.<sup>5</sup> The House impeached President Bill Clinton in 1998, based in part on obstruction of justice.<sup>6</sup> The allegations against Clinton included charges that he had lied and withheld evidence in a civil action and lied to a grand jury.<sup>7</sup> Obstruction of justice controversies also entangled the George W. Bush administration in the wake of firings of U.S. attorneys,<sup>8</sup> and the onetime chief of staff to Vice President Dick Cheney was convicted of obstruction.<sup>9</sup> Amazingly, six of the last nine presidents, or their top aides, were embroiled in obstruction of

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<sup>1</sup> See Michael S. Schmidt, *Comey Memo Says Trump Asked Him to End Flynn Investigation*, N.Y. TIMES (May 16, 2017), <https://www.nytimes.com/2017/05/16/us/politics/james-comey-trump-flynn-russia-investigation.html>; Samuel W. Buell, *Open and Shut: The Obstruction of Justice Case Against Trump Is Already a Slam Dunk*, SLATE (July 6, 2017, 10:59 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/07/the\\_obstruction\\_of\\_justice\\_case\\_against\\_trump\\_is\\_already\\_a\\_slam\\_dunk.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/the_obstruction_of_justice_case_against_trump_is_already_a_slam_dunk.html).

<sup>2</sup> IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, at 2 (1974).

<sup>3</sup> *Id.* at 641.

<sup>4</sup> See, e.g., Terence Hunt, *White House Ready to ‘Take Lumps’ on Iran Arms Scandal*, ASSOC. PRESS (Feb. 14, 1987) (quoting Democratic chairman of the House Foreign Affairs Committee); Evans Witt, *Feminist Leader Calls for Female Leadership, Reagan Impeachment*, ASSOC. PRESS (July 9, 1987) (quoting president of the National Organization for Women).

<sup>5</sup> Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 187, 214–15 (1999).

<sup>6</sup> H.R. Res. 611, 105th Cong. (1998).

<sup>7</sup> *Id.*

<sup>8</sup> See *infra* Section I.C.

<sup>9</sup> See Carol D. Leonnig and Amy Goldstein, *Libby Found Guilty in CIA Leak Case*, WASH. POST (Mar. 7, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/06/AR2007030600648.html>.

justice scandals. The law of obstruction of justice has evolved into a major check on presidential power, without anyone noticing it.

But the claim that the president can commit such a crime faces a powerful objection rooted in the Constitution. Obstruction of justice laws are normally applied to private citizens—people who bribe jurors, hide evidence from the police, or lie to investigators. The president is the head of the executive branch and therefore also the head of federal law enforcement. He can fire the FBI director, the attorney general, or any other principal officer in the executive branch who fails to maintain his confidence. If President Trump can fire an FBI director merely for displeasing him, why can't he fire an FBI director who pursues an investigation that the president wants shut down?

The president's control over law enforcement is sometimes regarded as a near-sacred principle in our constitutional system. In Justice Scalia's words, "Governmental investigation and prosecution of crimes is a quintessentially executive function."<sup>10</sup> The principle can be given several justifications. First, as Justice Scalia notes, presidential control over law enforcement limits the risk of legislative tyranny: if Congress passes bad laws, the president can weaken their effect by refusing to enforce them or enforcing them only in limited cases. Second, the president is the only individual who is held responsible for the general operation of the national government. Given limited budgets, someone needs to decide on enforcement priorities, which means blocking some types of enforcement while authorizing others. That someone is, as a matter of custom and design, the president, whose synoptic vision and electoral accountability to the national public make him well qualified to perform that function.

But the principle of presidential control comes into conflict with other constitutional values. The first is the idea that no person is above the law.<sup>11</sup> No one thinks that that the president should be able to commit a crime and then call off the investigation of it. What if he murdered his valet? The second—and the more serious problem, as a practical matter—is that the president might use his control of law enforcement to hamper political opposition. It is obvious enough that it would be wrong for the president to order spurious investigations of his political opponents in order to harass them. But it would seem to follow that the president should not call off investigations of his political aides and allies (and of himself) in order to protect them (and himself) from legal jeopardy. If he could, then he or his aides could engage in criminal activity in order to harass their political opponents—as the Watergate burglary, a spy operation against the

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<sup>10</sup> *Morrison v. Olson*, 487 U.S. 654, 706 (Scalia, J., dissenting).

<sup>11</sup> *See, e.g., United States v. Nixon*, 418 U.S. 683, 715 (1974) (rejecting notion that "a President is above the law").

Democratic National Committee, illustrates—without fear of legal liability.

The founders recognized this conundrum and sought to address it by granting Congress the impeachment power. Congress was not supposed to impeach a president merely because of political disagreement. Impeachment was supposed to be based on “Treason, Bribery, or other high Crimes and Misdemeanors”<sup>12</sup>—in Alexander Hamilton’s words, it was to “proceed from . . . the abuse or violation of some public trust.”<sup>13</sup> The Senate was supposed to act in a “judicial” manner when it convened as a court to try impeachments. As such, it would develop a set of precedents that would guide impeachment proceedings going forward.

More than two and a quarter centuries have elapsed without the Senate determining whether presidential obstruction of justice is a high crime or misdemeanor that might warrant removal from office. President Nixon resigned before he could be impeached. The Senate split 50-50 on the obstruction of justice charge against President Clinton. Moreover, questions of impeachability and indictability are distinct—obstruction by the president might be a “high crime or misdemeanor” in the Senate but not a punishable offense in federal court.<sup>14</sup> The latter question likewise remains open: President Ford’s pardon preempted the possibility that Nixon might stand trial on charges of obstructing justice while in the White House. For his part, President Clinton agreed to a five-year suspension of his law license and a \$250,000 fine in order to avert criminal prosecution on obstruction and other charges.<sup>15</sup>

In this article,<sup>16</sup> we argue that the crime of obstruction of justice does

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<sup>12</sup> U.S. CONST. art II, § 4.

<sup>13</sup> THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>14</sup> See Lawrence H. Tribe, *Defining “High Crimes and Misdemeanors”: Basic Principles*, 67 GEO. WASH. L. REV. 712, 717 (1999) (“[I]t appears to be all but universally agreed that an offense need not be a violation of criminal law at all in order for it to be impeachable as a high crime or misdemeanor.”).

<sup>15</sup> Editorial, *Mr. Clinton’s Last Deal*, N.Y. TIMES (Jan. 20, 2001), <http://www.nytimes.com/2001/01/20/opinion/mr-clinton-s-last-deal.html>.

<sup>16</sup> This expands upon arguments we have sketched out, individually and together, in a series of blog posts and opinion pieces. See Eric Posner, *Can the President Commit the Crime of Obstruction of Justice*, ERICPOSNER.COM (June 9, 2017), <http://ericposner.com/can-the-president-commit-the-crime-of-obstruction-of-justice>; Daniel Hemel & Eric Posner, *Can the President Commit the Crime of Obstruction?, II*, ERICPOSNER.COM (June 10, 2017), <http://ericposner.com/can-the-president-commit-the-crime-of-obstruction-ii>; Daniel Hemel & Eric Posner, *When Does the President Commit Obstruction of Justice?, III*, ERICPOSNER.COM (June 12, 2017), <http://ericposner.com/when-does-the-president-commit-obstruction-of-justice-iii>; Daniel Hemel & Eric Posner, *Meta-Obstruction of Justice*, ERICPOSNER.COM (June 13, 2017), <http://ericposner.com/meta-obstruction-of-justice>; Daniel Hemel & Eric Posner, Op-Ed, *The Case for Obstruction Charges*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/2017/06/15/opinion/the-case-for-obstruction-charges.html>; Daniel Hemel & Eric Posner, Op-Ed, *If Trump Pardons, It Could Be a Crime*,

apply to the president, but it applies in a special way because of the president's role as head of the executive branch. As defined by statute and precedent, the crime of obstruction occurs when an individual "corruptly" endeavors to impede or influence an investigation or other proceeding, and the word "corruptly" is understood to mean "with an improper purpose." When the president impedes or influences an investigation with a proper purpose, he does not commit the crime of obstruction. The critical question, then, is when it is proper for the president to intervene.

Article II of the Constitution suggests an answer to that question. It vests the president with "executive power;" obligates him to "take care that the laws be faithfully executed," and gives some other roles and functions like that of commander-in-chief. When these authorities empower him to achieve certain goals, he is allowed to drop or block prosecutions and other enforcement actions that interfere with those goals. For example, if the president intervenes in an investigation because he thinks that national security demands it, he acts properly and not corruptly. Likewise, if the president decides in good faith that a particular investigation or class of investigations represents a poor use of scarce enforcement resources, he may block it (or them) without committing obstruction of justice.<sup>17</sup> But if the president interferes with an investigation because he worries that it might bring to light criminal activity by himself, his family, or his top aides—and not for reasons related to national security or faithful execution of federal law—then he acts corruptly, and thus criminally. The Constitution does not authorize the president to employ his office for personal or partisan advantage, and intervening in an investigation for that purpose is not a proper

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N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/opinion/if-trump-pardons-crime-russia.html>; Daniel Hemel & Eric Posner, *The Obstruction of Justice Case Against Donald Trump*, SLATE (July 27, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/07/trump\\_is\\_violating\\_federal\\_law\\_by\\_pushing\\_sessions\\_to\\_go\\_after\\_hillary\\_clinton.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/trump_is_violating_federal_law_by_pushing_sessions_to_go_after_hillary_clinton.html). We have benefitted from the writings of others who have considered the application of the obstruction statutes to President Trump in recent months. See, e.g., Samuel W. Buell, *Open and Shut*, SLATE (July 6, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/07/the\\_obstruction\\_of\\_justice\\_case\\_against\\_trump\\_is\\_already\\_a\\_slam\\_dunk.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/the_obstruction_of_justice_case_against_trump_is_already_a_slam_dunk.html); Frank O. Bowman, *Sam Buell on Obstruction, IMPEACHABLE OFFENSES?* (July 8, 2017), <https://impeachableoffenses.net/2017/07/08/sam-buell-on-obstruction>; Samuel W. Buell & Frank O. Bowman, *Professor Buell Responds on Obstruction, IMPEACHABLE OFFENSES?* (July 10, 2017), <https://impeachableoffenses.net/2017/07/10/professor-buell-responds-on-obstruction>.

<sup>17</sup> We take no position on whether the "take care" clause or any other provision forbids the president to refuse to enforce statutes for good-faith policy reasons; in any event, we do not believe that such action could count as "obstruction of justice." We discuss this issue in section I.B.

use of presidential power.

In Part I, we provide background on the crime of obstruction of justice and on the president's authority over law enforcement. We propose a test for presidential obstruction of justice that balances competing constitutional values in a workable way. While the application of the obstruction statutes to the president raises a number of novel legal questions, courts considering these questions would have several sources from which to draw. First, specific constitutional provisions support a broader structural inference that a president abuses his power when he uses his office to pursue personal, pecuniary, and narrowly partisan objectives. Second, ethical and legal guidelines that control lower-level law enforcement officials buttress the notion that prosecutorial discretion does not allow one to wield law enforcement power for personal, pecuniary, and partisan ends. While the application of the obstruction statutes to the president presents questions that are in some sense *sui generis*, these questions are in other respects analogous to the challenges addressed elsewhere in the Constitution, and to challenges that federal prosecutors routinely face.

In Part II, we address a range of complications and counterarguments. First, we address the problem of mixed motives. Does a president obstruct justice if he stops an investigation for both personal reasons and reasons of the public interest? We argue that he does if the personal reason is a but-for cause of the action. Second, we consider the argument that a crime of presidential obstruction of justice is inconsistent with the pardon power. According to this argument, since the president may pardon someone before that person has been convicted of a crime, and such a pardon could be made to halt an investigation, he cannot coherently be found criminally liable for obstructing justice. We reject this argument. Even if the pardon power is plenary (and we note several objections to that view), halting an investigation and pardoning a person are different actions, with different political costs, so there is no inconsistency between criminalizing obstruction of justice and allowing pardons. Further, we argue that if a president pardons someone in order to obstruct justice, the president may be guilty of a crime even if the pardon itself is valid in the sense of releasing the pardoned person from criminal liability.

Third, we briefly address the argument that all talk of presidential obstruction of justice is idle because the president cannot be convicted of a crime while in office. The problem with this view is that impeachment is at least partly based on criminal activity, so it may matter whether obstruction of justice is a crime. Moreover, it is possible that the president *can* be convicted of a crime while in office; and even if he cannot, he can be convicted after he leaves office of a crime that he committed while in office.

Finally, we discuss and reject the argument that the canon of

constitutional avoidance—the principle that statutory ambiguities should be resolved in a way that avoids difficult constitutional questions—cuts against applying the obstruction of justice statutes to the president. The avoidance canon applies only in cases of ambiguity, and there is nothing in the text or the legislative history of the obstruction statutes that suggests the president might be excluded.

## I. ANALYSIS

### A. *Obstruction of Justice*

Obstruction of justice is an offense with roots in the nation's founding. The Declaration of Independence charged King George III with "obstruct[ing] the administration of justice, by refusing his assent to the laws for establishing judiciary powers."<sup>18</sup> George interfered with the establishment of courts, not with particular investigations, but the principle is the same. While we won't belabor this point, we note that if the king could commit obstruction of justice, surely the president, whose executive power is more limited, can as well.

The first federal obstruction statute dates from 1831,<sup>19</sup> and provided for the punishment of "any person or persons" who "corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice" in "any court of the United States."<sup>20</sup> This original obstruction statute has survived, with relatively minor modifications, to today, and is now codified as section 1503 of title 18.<sup>21</sup>

Since the 19th century, Congress has added several more obstruction statutes to the criminal code.<sup>22</sup> While the various statutes differ in their scope,

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<sup>18</sup> THE DECLARATION OF INDEPENDENCE para. 10 (U.S. 1776).

<sup>19</sup> Act of Mar. 2, 1831, ch. 99, 4 Stat. 487. Prior to this, the crime of obstruction was not sharply distinguished from contempt of court. *See Note, Criminal Venue in the Federal Courts: The Obstruction of Justice Puzzle*, 82 MICH. L. REV. 90, 97 (1983). The 1831 law limited contempt to cases involving misbehavior in or near federal courts, misbehavior by court officers, and disobedience of court orders. Act of Mar. 2, 1831, ch. 99, § 1, 4 Stat. at 487–88. Obstruction applied to misdeeds that occur farther afield.

<sup>20</sup> *Id.* § 2, 4 Stat. at 488.

<sup>21</sup> Section 1503(a) provides (in relevant part) that:

Whoever . . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished . . .

18 U.S.C. § 1503(a) (2012).

<sup>22</sup> In addition to section 1503, two more obstruction statutes are particularly relevant to presidential conduct. Section 1505, added in 1940, provides (in relevant part) that:

all share three basic elements. First, they all contain a similar *actus reus* requirement: the defendant must influence, obstruct, or impede the due administration of justice, or endeavor to do the same. Second, they include the same *mens rea* requirement: the defendant must act “corruptly.” Third, they all include a scope limitation. Corruptly obstructing the administration of justice in the abstract is not enough for criminal liability. The obstruction must affect some sort of proceeding.

### 1. Actus Reus

To be guilty of obstruction under federal law, a person must—or must endeavor or attempt to—*influence, obstruct, or impede* a proceeding.<sup>23</sup> In the run-of-the-mill obstruction case, the defendant is charged with altering, concealing, or destroying subpoenaed documents, or with encouraging or giving false testimony,<sup>24</sup> but the obstruction statutes have been extended to a range of other activities as well.<sup>25</sup> In one case, a witness was convicted of obstruction after he claimed memory loss 134 times in a 90-minute Securities and Exchange Commission deposition.<sup>26</sup> In another case, a defendant was

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Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress . . . [s]hall be fined . . . , imprisoned . . . , or both.

§ 1505; *see* Act of January 13, 1940, ch. 1, § 135(a), 54 Stat. 13 (1940). Section 1512(c), added in 2002, provides (in relevant part) that:

Whoever corruptly . . . obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined . . . or imprisoned . . . or both.

§ 1512(c); *see* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1102, 116 Stat. 745, 807.

<sup>23</sup> *See* 18 U.S.C. § 1503(a) (“influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice”); § 1505 (“influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law”); § 1512(c)(2) (“obstructs, influences, or impedes . . . , or attempts to do so”).

<sup>24</sup> *See* Matthew Harrington & Benjamin Schiffelbein, *Obstruction of Justice*, 51 AM. CRIM. L. REV. 1477, 1488–90 (2014).

<sup>25</sup> *See, e.g.,* United States v. Silverman, 745 F.2d 1386, 1393 (11th Cir. 1984) (section 1503 “reaches all corrupt conduct capable of producing an effect that prevents justice from being duly administered, regardless of the means employed”).

<sup>26</sup> *See* United States v. Alo, 439 F.2d 751, 752–54 (2d Cir. 1971) (witness’s “blatantly evasive testimony” can qualify as obstruction even though it might not rise to level of



convicted of obstruction for obtaining grand jury transcripts from a typist who worked for a court reporter service and then sharing them with the target of the grand jury probe.<sup>27</sup> In still another case, a criminal defense lawyer was convicted of obstruction after filing a flood of motions in state and federal court knowing that they contained an inaccurate rendition of events.<sup>28</sup>

The *actus reus* requirement does not require that an obstruction conviction be predicated on a single act. A “continuing course of conduct” that obstructs an investigation can be the basis for guilt.<sup>29</sup> And as the use of the verbs “endeavor” and “attempt” in the obstruction statutes suggests, a defendant can be convicted of obstruction even if his effort to stymie an investigation does not succeed. Moreover, a defendant who is innocent of the underlying charge can be convicted for obstructing the investigation into that charge.<sup>30</sup> Obstruction of justice is an independent crime.

But of course, it cannot be the case that *any* action or course of conduct that might interfere with an investigation of any charge constitutes criminal obstruction. The criminal defense lawyer who moves to quash a subpoena thereby impedes an investigation, but that does not mean that she should go to jail. What separates the wheat from the chaff in obstruction cases is the *mens rea* requirement: to be guilty of obstruction, a defendant must act with a “corrupt purpose.”<sup>31</sup>

## 2. Mens Rea

What exactly does it mean for a defendant to act with a “corrupt purpose,” and thus to meet the *mens rea* requirement for obstruction?<sup>32</sup> Four possible interpretations emerge from the case law.

One view is that a defendant acts “corruptly” whenever he specifically seeks to interfere with a proceeding.<sup>33</sup> On this view, “the word ‘corruptly’

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perjury).

<sup>27</sup> *United States v. Jeter*, 775 F.2d 670, 672–73, 675–79 (6th Cir. 1985).

<sup>28</sup> *United States v. Cueto*, 151 F.3d 620, 624–35 (7th Cir. 1998).

<sup>29</sup> *See United States v. North*, 708 F. Supp. 372, 374 (D.D.C. 1998).

<sup>30</sup> *See United States v. Hopper*, 177 F.3d 824, 831 (9th Cir. 1999).

<sup>31</sup> *See United States v. Cintolo*, 818 F.2d 980, 995 (1st Cir. 1987) (“When all is said and done, what separates the wheat from the chaff in this case is the plentitude of evidence developed at trial from which the jury could have concluded that [the defendant acted] with corrupt purpose . . .”).

<sup>32</sup> Sections 1503 and 1505 also make it a crime to obstruct justice “by threats or force, or by any threatening letter of communication.” *See* 18 U.S.C. §§ 1503(a), 1505. Our focus here is on harder cases in which the threat and force prongs of the obstruction statutes do not apply.

<sup>33</sup> *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981) (construing 18 U.S.C. § 1503(a)).

means nothing more than an intent to obstruct the proceeding.”<sup>34</sup> But this view goes too far by interfering with accepted elements of the adversary proceeding. Everyone agrees that the defense lawyer who knows his client is guilty but gives a rousing closing statement that leads to the client’s acquittal does not commit obstruction, even though he endeavors to influence the due administration of justice. The problems with this view are even more acute in the context of section 1505, which applies to endeavors to influence, obstruct, or impede administrative and congressional proceedings. Minority party lawmakers, executive branch officials, and political activists all seek to influence congressional inquiries. One does not commit obstruction of justice simply by participating in the hurly burly of interest group politics.<sup>35</sup>

A second view is that the term “corruptly” does not refer to mens rea but instead to the *means* by which a defendant obstructs justice. If the defendant acts illegally in the course of obstructing the due administration of justice, then his conduct falls within the ambit of the obstruction statute. Judge Laurence Silberman pointed out the virtues of this view in a dissenting opinion in the case of Oliver North, a Reagan administration official convicted of obstructing Congress’s investigation into the Iran-Contra affair:

If the jury focuses on the means chosen by the defendant in his endeavor to obstruct, it would not necessarily need to probe the morality or propriety of the defendant’s purpose—something the criminal law ordinarily eschews. . . . The “means” view does seem to mitigate that problem since, for example, a defendant who bribes the chairman of a congressional committee can be said to have acted “corruptly” no matter how laudable his underlying motive.<sup>36</sup>

One objection to this means-based view is that it renders the obstruction of justice statutes redundant with other statutes, so that obstruction serves as no more than a sentencing enhancement. If “corruptly” requires that the defendant’s act be independently unlawful, then the obstruction statutes merely enhance the penalties for an act that the criminal law already proscribes. In any event, as we shall soon see, the means-based view has been decisively rejected by Congress.

A third view comes from the D.C. Circuit’s opinion in the case of John Poindexter, who served as national security adviser to President Reagan and who—like North—was later charged with and convicted of obstruction

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<sup>34</sup> See *United States v. North*, 910 F.2d 843, 882 (D.C. Cir. 1990) (summarizing case law from other circuits without adopting this view).

<sup>35</sup> See *id.* (“No one can seriously question that people constantly attempt, in innumerable ways, to obstruct or impede congressional committees . . . but it does not necessarily follow that [they do] so corruptly.”).

<sup>36</sup> *Id.* at 943 (Silberman, J., concurring in part and dissenting in part).

in connection with the Iran-Contra scandal. The majority opinion in the *Poindexter* case suggested that the term “corruptly” in section 1505 should be read “transitively”: a defendant “corruptly” obstructs a proceeding when he interferes with the proceeding “by means of corrupting another.”<sup>37</sup> More specifically, the majority suggested that the statute should “include only ‘corrupting’ another person by influencing him *to violate his legal duty*.”<sup>38</sup> But the obstruction statutes had long been construed to apply to defendants whose solo actions interfered with a proceeding.<sup>39</sup> Moreover, it is a puzzle why Congress would have wanted to punish defendants who encourage others to violate their legal duties but not to punish defendants who violate their own legal duties.<sup>40</sup>

Congress decisively rejected the D.C. Circuit’s “transitive” interpretation. The False Statements Accountability Act of 1996, which abrogated the *Poindexter* ruling,<sup>41</sup> provides that “[a]s used in section 1505, the term ‘corruptly’ means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.”<sup>42</sup> And while the 1996 law on its face applies only to section 1505, the legislative history suggests that the bill’s goal was to align the construction of “corruptly” in section 1505 with interpretation of that term in the other obstruction statutes. Senator Levin, one of the bill’s sponsors, said that the bill would “bring [section 1505] back into line with other obstruction statutes protecting government inquiries.”<sup>43</sup> And indeed, several other courts had previously interpreted the term “corruptly” in other obstruction statutes to mean just that: motivated by an “improper purpose.”<sup>44</sup>

<sup>37</sup> *United States v. Poindexter*, 951 F.2d 369, 379 (D.C. Cir. 1991).

<sup>38</sup> *Id.* at 379 (emphasis in original).

<sup>39</sup> *See, e.g.*, *United States v. Lavelle*, 751 F.2d 1266 (D.C. Cir. 1985) (submitting false statement to congressional committee); *United States v. Vixie*, 532 F.2d 1277 (9th Cir. 1976) (submitting false documents in response to IRS subpoena); *United States v. Alo*, 439 F.2d 751 (2d Cir. 1971) (evasive testimony).

<sup>40</sup> *Poindexter*, 951 F.2d at 391 (Mikva, J., dissenting) (noting strange result of the majority’s transitive interpretation).

<sup>41</sup> False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 3, 110 Stat. 3459 (codified at 18 U.S.C. § 1515(b)); *see United States v. Hassoun*, 477 F. Supp. 2d 1210, 1226–27 (S.D. Fla. 2007) (noting that “*Poindexter*’s holding ha[s] been overturned by Congress’ enactment of 18 U.S.C. § 1515(b)”).

<sup>42</sup> 18 U.S.C. § 1515(b).

<sup>43</sup> False Statements After the Hubbard v. United States Decision, Hearing on S. 1734 Before the S. Comm. on the Judiciary, 104th Cong., 2d sess., at 5 (May 4, 1996).

<sup>44</sup> *See, e.g.*, *United States v. Fasolino*, 586 F.2d 939, 941 (2d Cir. 1978) (construing § 1503); *United States v. Partin*, 552 F.2d 621, 642 (5th Cir. 1977) (“the word ‘corruptly’ in § 1503 means a defendant acted with improper motive or with bad or evil or wicked purpose” (some internal quotation marks omitted)); *United States v. Haldeman*, 559 F.2d 31, 115 n.229 (D.C. Cir. 1976) (quoting jury instructions stating that “[t]he word, ‘corruptly’, as used in

This fourth view—that “corruptly” means motivated by an “improper purpose”—is now the near-consensus view among the courts of appeals.<sup>45</sup> Yet agreeing that “corruptly” refers to “improper purpose” still leaves the question of what purposes are “proper.” The answer will depend on the actor’s role. The prosecutor who intervenes in an investigation because she thinks it represents a misallocation of law enforcement resources acts with a proper purpose. The citizen activist who obstructs an investigation because she thinks it represents a misallocation of law enforcement resources might well be criminally liable.

The role-based nature of the mens rea inquiry does not imply that prosecutors enjoy absolute immunity from obstruction charges. Consider the case of former Pennsylvania attorney general Kathleen Kane, who clashed repeatedly with a Philadelphia prosecutor named Frank Fina.<sup>46</sup> While she was attorney general, Kane allegedly leaked secret grand jury documents to a Philadelphia newspaper implying that Fina had bungled a probe of a Philadelphia civil rights leader.<sup>47</sup> When her subordinates suggested that the attorney general’s office should look into the leak, Kane reportedly told her staff not to investigate the matter, and also asked one of her subordinates to take action to shut down a grand jury probe into the leak.<sup>48</sup> On the basis of this evidence, Kane was indicted for obstruction of justice under

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[section 1503] simply means having an evil or improper purpose or intent”).

<sup>45</sup> See *United States v. Gordon*, 710 F.3d 1124, 1151 (10th Cir. 2013) (“Acting ‘corruptly’ within the meaning of § 1512(c)(2) means acting with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct . . .” (internal quotation marks omitted)); *United States v. Mintmire*, 507 F.3d 1273, 1289 (11th Cir. 2007) (“‘corruptly’ as used in section 1512(c)(2) means ‘with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct’ an official proceeding); *United States v. Arthur Andersen LLP*, 374 F.3d 281, 296 (5th Cir. 2004) (“Under the caselaw, ‘corruptly’ requires an improper *purpose*” (emphasis in original)), *rev’d and remanded on other grounds*, 544 U.S. 696 (2005); *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (noting that “we have interpreted the term ‘corruptly,’ as it appears in § 1503, to mean motivated by an improper purpose,” and extending that interpretation to section 1512); *Brown v. United States*, 89 A.3d 98, 104 (D.C. 2014) (“individuals act ‘corruptly’ when they are ‘motivated by an improper purpose’”); see also *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005) (“‘Corrupt’ and ‘corruptly’ are normally associated with wrongful, immoral, depraved, or evil.”)

<sup>46</sup> See Charles Thompson, *In Kathleen Kane v. Frank Fina, Bad Blood, Porn and Leaks Make for Mutually Assured Destruction*, PENNLIVE (Aug. 26, 2015), [http://www.pennlive.com/midstate/index.ssf/2015/08/post\\_787.html](http://www.pennlive.com/midstate/index.ssf/2015/08/post_787.html).

<sup>47</sup> *In re Thirty-Five Statewide Investigating Grand Jury*, No. 171 M.D. Misc. Dkt. 2012, Notice No. 123, Presentment #60, at 9-12 (Sup. Ct. Pa., Ct. of Common Pleas, Dec. 19, 2014), available at [bit.ly/2vvozZW](http://bit.ly/2vvozZW).

<sup>48</sup> *Id.* at 16.

Pennsylvania law.<sup>49</sup> She was ultimately convicted of obstruction as well as other charges.<sup>50</sup>

The Kane case suggests that a prosecutor who abuses her position to tar a political rival and then tries to shut down any inquiry into the matter thereby commits obstruction of justice. But what of a district attorney who drops an investigation of a popular celebrity because of a possible adverse public reaction that would harm his chances of reelection?<sup>51</sup> Would it change matters if the district attorney's decision was not political, but was based on his personal affection for the celebrity based on the celebrity's role in a long-ago television show? Case law provides little guidance. The Pandora's box of hypotheticals does not mean, however, that prosecutors who abuse their power for personal, pecuniary, or partisan ends get off scot-free, as the Kane episode illustrates.

The application of the obstruction statutes to the president in particular will raise sensitive questions regarding the president's proper role in law enforcement. Section I.B takes up those questions.

### 3. Scope Limitations

The first obstruction statute in 1831 applied only to obstruction of justice in federal court. And while section 1503 on its face now applies to obstruction of the "due administration of justice" anywhere, courts have interpreted section 1503 to apply only to the obstruction of federal judicial proceedings (including grand jury investigations).<sup>52</sup> Thus, obstruction of a federal

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<sup>49</sup> *Id.* at 27. The language of the relevant Pennsylvania statute differs slightly from the federal analogue. It applies to anyone who "intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act." 18 Pa. C.S.A. § 5101. Pennsylvania courts have understood the provision to apply when a public official "perform[s] . . . a discretionary duty with an improper or corrupt motive." *See In re Gentile*, 654 A.2d 676, 684 (Pa. Comm. Ct. 1994) (opinion of Johnson, J.).

<sup>50</sup> Jess Bidgood, *Pennsylvania's Attorney General Is Convicted on All Counts*, N.Y. TIMES (Aug. 15, 2016), <https://www.nytimes.com/2016/08/16/us/trial-kathleen-kane-pennsylvania-attorney-general.html>.

<sup>51</sup> *Cf.* Justin Wm. Moyer, *The Prosecutor Undone by a 'Secret Agreement' with Bill Cosby*, WASH. POST (Feb. 4, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/02/04/the-prosecutor-undone-by-a-secret-agreement-with-bill-cosby/?utm\\_term=.689dcd0b71ee](https://www.washingtonpost.com/news/morning-mix/wp/2016/02/04/the-prosecutor-undone-by-a-secret-agreement-with-bill-cosby/?utm_term=.689dcd0b71ee).

<sup>52</sup> *See United States v. Scoratow*, 137 F. Supp. 620, 621–22 (W.D. Pa. 1956); *accord United States v. Simmons*, 591 F.2d 206, 208 (3d Cir. 1979) (citations omitted) ("A prerequisite for conviction [under § 1503] is the pendency at the time of the alleged obstruction of some sort of judicial proceeding that qualifies as an 'administration of justice.'"); *United States v. Ryan*, 455 F.2d 728, 733 (9th Cir. 1971) (noting that the Ninth Circuit has "approved the decision in *United States v. Scoratow*"); *United States v. Bufalino*, 285 F.2d 408, 416 (2d Cir. 1960) (citing *Scoratow*, 137 F. Supp. 620) ("Falsehoods given

criminal investigation prior to the filing of an indictment would not come within the scope of section 1503.

Section 1505, enacted in 1940, does apply beyond federal court to obstruction of any proceeding pending before a “department or agency of the United States,” or before Congress.<sup>53</sup> Just how far it applies has been a subject of confusion. For the first several decades after the statute’s enactment, courts routinely applied section 1505 to the obstruction of investigations by federal agencies such as the Federal Trade Commission and the Securities and Exchange Commission.<sup>54</sup> But in a 1981 case, *United States v. Higgins*, a federal district court held that section 1505 did not apply to obstruction of an FBI probe.<sup>55</sup> The district court said it was “convinced, after careful examination of the case law and pertinent legislative history,” that section 1505 applied only to agencies with rulemaking or adjudicative powers and not to purely investigatory agencies such as the FBI.<sup>56</sup>

The “case law and pertinent legislative history” cited by *Higgins* offer little support for the court’s conclusion. *Higgins* relies on *United States v. Mitchell*, a 1973 decision in which the court stated that under section 1505 “it was not a crime to obstruct a criminal investigation or inquiry before the initiation of proceedings within the scope” of that statute.<sup>57</sup> But *Mitchell* fails to resolve the question of what proceedings fall within the scope of section 1505; it simply notes that section 1505 applies only after such proceedings are underway. *Mitchell*, moreover, has since been rejected by the Second Circuit, which holds that section 1505 does extend to investigations potentially leading to criminal charges.<sup>58</sup> Meanwhile, the only legislative history supporting the *Higgins* court’s conclusion is a 1967 House Judiciary

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before non-judicial inquiries are not encompassed within 18 U.S.C. § 1503, the federal obstruction of justice statute”).

<sup>53</sup> Act of January 13, 1940, ch. 1, § 135(a), 54 Stat. 13 (codified as amended at 18 U.S.C. § 1505).

<sup>54</sup> See *United States v. Abrams*, 427 F. 2d 86, 90 (2d Cir. 1970) (Immigration and Naturalization Service); *United States v. Fruchtman*, 421 F.2d 1019, 1020–21 (6th Cir. 1970) (Federal Trade Commission); *Rice v. United States*, 356 F.2d 709, 712–13 (8th Cir. 1966) (National Labor Relations Board); *United States v. Batten*, 226 F. Supp. 492, 493–94 (D.D.C. 1964) (obstruction of SEC investigation); *United States v. Brumfield*, 85 F. Supp. 696, 699–704 (W.D. La. 1949) (obstruction of Federal Petroleum Board investigation). See generally *United States v. Sutton*, 732 F.2d 1483, 1490 (10th Cir. 1984) (“Agency investigative activities are ‘proceedings’ within the meaning of § 1505.”).

<sup>55</sup> *United States v. Higgins*, 511 F. Supp. 453, 455 (W.D. Ky. 1981).

<sup>56</sup> *Id.*

<sup>57</sup> *United States v. Mitchell*, 372 F. Supp. 1239, 1250 (S.D.N.Y. 1973) (cited at *Higgins*, 511 F. Supp. at 456).

<sup>58</sup> *United States v. Schwartz*, 924 F.2d 410, 423 (2d Cir. 1991); see also *United States v. Lester*, 749 F.2d 1288, 1298 (9th Cir. 1984) (rejecting *Mitchell*). Of course, the *Higgins* court did not know in 1981 that the Second Circuit would reject *Mitchell* a decade later.

Committee report noting that “attempts to obstruct a criminal investigation or inquiry before a proceeding has been initiated are not within the proscription of [section 1505].”<sup>59</sup> But again, the House Judiciary Committee report does not speak to the question of when a “proceeding” starts.

Despite its shaky foundations, *Higgins* has had a wide impact. A number of other district courts have followed the decision.<sup>60</sup> A Justice Department manual instructs federal prosecutors to abide by it, telling them that “investigations by the Federal Bureau of Investigation (FBI) are not section 1505 proceedings.”<sup>61</sup> Indeed, in 2009, after federal prosecutors in Virginia won a conviction under section 1505 for obstruction of an investigation by the FBI and the Drug Enforcement Agency, the government confessed error and conceded that the conviction should be vacated (as it was).<sup>62</sup> Yet the Justice Department’s practice with respect to section 1505 is far from consistent. At almost the exact same time as the Virginia case, federal prosecutors in Missouri also won a conviction under section 1505 for obstruction of an FBI investigation. On appeal, the Eight Circuit affirmed the conviction.<sup>63</sup> Other circuits that have weighed in on the question have not spoken with a single voice.<sup>64</sup>

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<sup>59</sup> H.R. REP. NO. 90-658, as reprinted in 1967 U.S.C.C.A.N. 1760, 1760.

<sup>60</sup> See *United States v. McDaniel*, No. 12-28, 2013 U.S. Dist. LEXIS 110475, at \*14 (N.D. Ga. Jan. 29, 2013) (following *Higgins* and holding that FBI investigation is “not a ‘proceeding’ under 18 U.S.C. § 1505”); *United States v. Edgemon*, No. 95-43, 1997 U.S. Dist. LEXIS 23820, at \*18 (E.D. Tenn. Aug. 18, 1997) (following *Higgins* and holding that “mere criminal investigation” is “not a proceeding for purposes of § 1505”); *United States v. Wright*, 704 F. Supp. 613, 615 (D. Md. 1989) (following *Higgins* and holding that obstruction of investigation by U.S. Attorney’s Office does not fall within scope of section 1505 because U.S. Attorney “does not, to this Court’s knowledge, have either rule-making or adjudicative authority”).

<sup>61</sup> See U.S. DEPT’T OF JUSTICE, UNITED STATES ATTORNEY’S CRIMINAL RESOURCE MANUAL 1727 (1997), <https://www.justice.gov/usam/criminal-resource-manual-1727-protection-government-processes-omnibus-clause-18-usc-1505>.

<sup>62</sup> *United States v. Adams*, 335 F. App’x 338, 342–43 (4th Cir. 2009).

<sup>63</sup> See *United States v. Khnum Haim Hayes*, 329 F. App’x 680, 681 (8th Cir. 2009). While the Eighth Circuit did not squarely hold that section 1505 applies to FBI investigations, it said, instead, that “[t]o the extent [the defendant] argues that an FBI investigation is not a ‘proceeding’ within the meaning of section 1505, we conclude any error was not plain because there is no precedent from the Supreme Court or this court directly resolving the issue.” *Id.* (citation omitted) (citing *Higgins*). In other words, because the defendant had not preserved the issue below, he could not have his conviction overturned on those grounds on appeal.

<sup>64</sup> The D.C. Circuit has held that an investigation by the Inspector General’s office of the U.S. Agency for International Development (USAID) is a “proceeding” within the scope of section 1505 because the office “is charged with the duty of supervising investigations relating to the proper operation of the agency” and because “the Inspector General is empowered to issue subpoenas and to compel sworn testimony in conjunction with an investigation of agency activities.” See *United States v. Kelley*, 36 F.3d 1118, 1127 (1994).

It is hard to explain why section 1505 should apply to obstruction of an investigation by the SEC or the FTC but not the FBI. The text of the statute does not command that result, and logic does not recommend it. And yet we acknowledge that a defendant charged under section 1505 for obstructing a federal criminal investigation would have a plausible argument that in light of the muddled case law, the rule of lenity weighs against applying the statute to his conduct.

But even if an FBI investigation does not come within the scope of section 1505, it might well fall within the scope of section 1512(c). That provision, enacted as part of the Sarbanes-Oxley Act of 2002,<sup>65</sup> makes it a crime to corruptly obstruct, influence, or impede “any official proceeding.” The term “official proceeding” is defined to mean any proceeding before a federal court or grand jury, a proceeding before Congress, or “a proceeding before a Federal Government agency which is authorized by law.”<sup>66</sup> Section 1512 also states that “an official proceeding need not be pending or about to be instituted at the time of the offense.”<sup>67</sup>

There are two ways in which an FBI investigation might fall within the scope of section 1512. First, an FBI investigation might be considered “a proceeding before a Federal Government agency which is authorized by law.” Federal law explicitly authorizes the FBI to “investigate any violation of Federal criminal law involving Government officers and employees.”<sup>68</sup> Obstruction of an FBI investigation into official misconduct, then, might be considered obstruction of an “official proceeding” within section 1512’s ambit. Some federal courts have adopted the view that an FBI investigation is an “official proceeding” under section 1512,<sup>69</sup> though others have rejected

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These factors distinguish the Inspector General’s office from the FBI, which has subpoena authority only in a small set of cases: investigations of federal health care offenses, federal offenses involving the sexual exploitation or abuse of children, and offenses related to controlled substances. *See* 18 U.S.C. § 3486(a)(1)(A)(i)(I); 21 U.S.C. § 876; 28 C.F.R. Pt. 0, Subpt. R, App. The Sixth Circuit, meanwhile, has said that an investigation by the Food and Drug Administration is a “proceeding” within the scope of section 1505 because “the FDA clearly possesses ‘enhanced’ investigative powers,” such as the power to inspect the premises of businesses regulated by the Food, Drug, and Cosmetics Act. *See United States v. Pugh*, 404 F. App’x 21, 26 (6th Cir. 2010).

<sup>65</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1102, 116 Stat. 745, 807 (codified at 18 U.S.C. 1512(c)).

<sup>66</sup> 18 U.S.C. § 1515(a).

<sup>67</sup> § 1512(f)(1).

<sup>68</sup> 28 U.S.C. § 535(a).

<sup>69</sup> *See, e.g., United States v. Plaskett*, No. 2007-60, 2008 U.S. Dist. LEXIS 62944, at \*12 n.2 (D.V.I. Aug. 13, 2008) (“To the extent [defendant] argues that the federal agency investigation does not constitute an official proceeding under Section 1512(c)(2), the Court is unpersuaded.”); *United States v. Hutcherson*, No. 6:05CR00039, 2006 U.S. Dist. LEXIS 48708, at \*7 (W.D. Va. July 5, 2006) (“Government agency actions, such as the FBI investigation of the defendant, are ‘official proceedings’ under Section 1512, whether or not



it.<sup>70</sup> Second, obstruction of an FBI investigation that leads to a grand jury proceeding might be construed as obstruction of the grand jury proceeding, which would bring it within the scope of section 1512. Recall that an official proceeding “need not be pending or about to be instituted” at the time of the section 1512 offense. The relevant question under the case law is whether the official proceeding “was foreseeable [to the defendant] when he or she engaged in the proscribed conduct.”<sup>71</sup> Several federal courts have held that obstructing an FBI investigation that foreseeably leads to a federal grand jury probe does fall within the scope of section 1512.<sup>72</sup>

To sum up so far: Federal law—through three different statutes—makes it a crime to “corruptly” obstruct, influence, or impede certain proceedings. The actus reus requirement has been construed broadly to include any action or course of action that obstructs justice. While much confusion has surrounded the mens rea requirement, Congress’s intervention in 1996 clarifies that “corruptly” refers to actions motivated by an “improper purpose.” And finally, while the outer contours of the obstruction statutes’ scope are somewhat blurry, these statutes clearly apply to obstruction of some federal agency investigations—and to obstruction of federal criminal investigations under certain circumstances.

### *B. The President’s Role*

We argued above that whether an act counts as obstruction of justice depends on the legal role of the person who engages in the act. Because private citizens do not have any formal role in the legal system, except when they are jurors, any act by a private citizen to interfere with an investigation—including destruction of documents and lying to investigators—will generally be “improper” and thus “corrupt” for mens rea purposes. Public officials with authority over law enforcement present a more complex situation. It is necessary to distinguish between legitimate and illegitimate acts that interfere

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a grand jury has been convened because Congress intended to deter obstruction of more than judicial proceedings with Section 1512.”)

<sup>70</sup> See *United States v. Ermoian*, 727 F.3d 894, 902 (9th Cir. 2013) (“[W]e conclude that a criminal investigation is not an ‘official proceeding’ under the obstruction of justice statute.”); *United States v. McDaniel*, No. 13-15, 2013 U.S. Dist. LEXIS 187658, at \*16-37 (N.D. Ga. Oct. 1, 2013) (collecting cases).

<sup>71</sup> *United States v. Shavers*, 693 F.3d 363, 378 (3d Cir. 2012); accord *United States v. Martinez*, No. 14-2759, 2017 U.S. App. LEXIS 12146, at \*23 (2d Cir. July 7, 2017) (government must prove that official proceeding was “reasonably foreseeable to the defendant”).

<sup>72</sup> See, e.g., *United States v. Holloway*, No. 08-224, 2009 U.S. Dist. LEXIS 108387, at \*15 (E.D. Cal. Nov. 19, 2009); see also *United States v. Frankhauser*, 80 F.3d 641, 651–52 (1st Cir. 1996) (reaching same result under pre-Sarbanes-Oxley version of section 1512).

with an investigation.

What is the president's role in law enforcement? The vesting clause of Article II gives the president "[t]he executive power,"<sup>73</sup> and the take care clause instructs him to "take care that the laws be faithfully executed."<sup>74</sup> Those provisions have been understood to give the president broad discretion over prosecutorial decisions.<sup>75</sup> Just how broad that discretion extends has been a matter of considerable controversy. The Supreme Court has rarely weighed in. Its most extensive treatment of the subject in recent decades came in the 1988 case *Morrison v. Olson*, involving the now-lapsed independent counsel statute.<sup>76</sup> Much of the discussion of presidential power over the last 30 years has taken *Morrison* as its starting point,<sup>77</sup> and so will we.

The story of *Morrison* starts with the Saturday Night Massacre of October 20, 1973. On that evening, President Nixon ordered his attorney general to fire special prosecutor Archibald Cox, who was then leading the investigation into the Watergate scandal. The attorney general, Elliot Richardson, refused and resigned, as did his deputy. Ultimately, it fell to the third in line at the Justice Department, Solicitor General Robert Bork, to fire Cox.<sup>78</sup>

That episode contributed to Congress passing the Ethics in Government Act of 1978,<sup>79</sup> which limited the president's power over certain prosecutions.<sup>80</sup> One provision of the statute created an independent counsel with authority to investigate allegations of criminal behavior by executive-branch officials, including the president, and to bring criminal charges in court. Under the law, the attorney general had the responsibility to request appointment of an independent counsel upon receipt of evidence that a covered official had committed a federal crime. Once the attorney general made that request, his power over the investigation was sharply limited. Authority to appoint the independent counsel lay with a panel of federal

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<sup>73</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>74</sup> *Id.* art. II, § 3.

<sup>75</sup> See, e.g., *Cnty. for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (1986) ("The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws . . .").

<sup>76</sup> 487 U.S. 654 (1988).

<sup>77</sup> See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 14 (1994) ("We begin with the narrow but revealing question of criminal prosecution, as presented in the contest over the independent counsel and resolved in *Morrison v. Olson*.").

<sup>78</sup> See Kenneth B. Noble, *New Views Emerge of Bork's Role in Watergate Dismissals*, N.Y. TIMES (July 26, 1987), <http://www.nytimes.com/1987/07/26/us/new-views-emerge-of-bork-s-role-in-watergate-dismissals.html>.

<sup>79</sup> Pub. L. No. 95-521, 92 Stat. 1824.

<sup>80</sup> Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1105 n.10 (1998).

judges, not the attorney general. And under the version of the statute that existed at the time of *Morrison*, the attorney general could remove the independent counsel only for good cause. The president himself lacked the authority to remove the independent counsel or otherwise intervene in his investigation.<sup>81</sup>

The immediate issue in the *Morrison* case involved an independent counsel probe into whether a Justice Department official had committed obstruction or other crimes in his testimony to a House subcommittee regarding certain EPA documents. The broader question was whether the independent counsel statute violated the constitutional separation of powers.<sup>82</sup> The Court concluded that it did not. Chief Justice Rehnquist's majority opinion acknowledged the "undeniable" fact that "the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity."<sup>83</sup> But in light of the attorney general's role in initiating the independent counsel's investigation and his power to remove the independent counsel for good cause, the Court said that the statute "give[s] the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties."<sup>84</sup>

In a celebrated solo dissent, Justice Scalia charged that the majority in *Morrison* had effected an "important change in the equilibrium of power" among the branches.<sup>85</sup> In his view, "the President's constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law,"<sup>86</sup> and the independent counsel statute deprived the president of that authority. According to Justice Scalia, the vesting clause of Article II must be read to give the president "not . . . *some* of the executive power, but *all* of the executive power."<sup>87</sup> Since the conduct of criminal investigations and prosecutions is a "purely" executive function, it cannot be assigned to anyone other than the president himself.<sup>88</sup> This view, according to which the president alone "controls" law enforcement and hence cannot be forced to share that function with other branches or autonomous bodies, is now known as the unitary executive theory,<sup>89</sup> and for committed unitarians,

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<sup>81</sup> See *Morrison*, 487 U.S. at 660-65 (summarizing statute).

<sup>82</sup> See *id.* at 665-69.

<sup>83</sup> *Id.* at 695.

<sup>84</sup> *Id.* at 696.

<sup>85</sup> *Id.* at 699 (Scalia, J., dissenting).

<sup>86</sup> *Id.* at 710.

<sup>87</sup> *Id.* at 705.

<sup>88</sup> See *id.* at 705, 733-34.

<sup>89</sup> See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 659 (1994) (defining the unitary executive theory as the view

Justice Scalia's *Morrison* dissent is gospel. Some commentators believe that the majority's opinion in the case is perhaps no longer good law.<sup>90</sup> Indeed, the independent counsel statute upheld in *Morrison* no longer is the law: a series of inquiries, culminating in the probe that led to the impeachment of President Clinton, persuaded many people that the independent counsel had grown too powerful, and Congress decided to let the independent counsel statute lapse rather than renew it when it expired in 1999.<sup>91</sup>

While the rhetorical force of Scalia's *Morrison* dissent is undeniable,<sup>92</sup> even the staunchest advocates of the unitary executive theory understand that Scalia's claim of "complete" presidential control over federal law enforcement cannot be taken literally.<sup>93</sup> Under the founding document, Congress exerts control over law enforcement in numerous ways. The president's appointments are subject to confirmation by the Senate, which means that the president may not be able to appoint loyalists to carry out his priorities. Congress defines most executive offices, which means that the president cannot combine or divide offices in the way that best advances his goals. And Congress holds the power of the purse, allowing it to threaten to withhold funds from presidents who do not respect Congress' enforcement preferences.<sup>94</sup>

Since the founding, Congress has imposed numerous additional constraints on the president's enforcement discretion. Civil service laws

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that the "President must be able to control the execution of all federal laws"). While Calabresi and Prakash trace the unitary executive theory back to the writings of Locke, Blackstone, and Montesquieu, *see id.* at 605-06, the phrase itself was rarely used pre-*Morrison*. *See, e.g.,* Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 58, 97 (discussing "concept of a unitary executive"). For criticisms of the unitary executive theory, *see, e.g.,* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963 (2001).

<sup>90</sup> *See, e.g.,* Adrian Vermeule, *Morrison v. Olson Is Bad Law*, LAWFARE (June 9, 2017), <https://www.lawfareblog.com/morrison-v-olson-bad-law>.

<sup>91</sup> *See* Helen Dewar, *Independent Counsel Law Is Set to Lapse*, WASH. POST (June 5, 1999), <http://www.washingtonpost.com/wp-srv/politics/special/counsels/stories/counsel060599.htm>.

<sup>92</sup> *See Justice Kagan and Judges Srinivasan and Kethledge Offer Views from the Bench*, STANFORD LAWYER, No. 92, Spring 2015 (quoting Justice Kagan as saying that Justice Scalia's *Morrison* opinion is "one of the greatest dissents ever written and every year it gets better").

<sup>93</sup> One account identifies three conditions of a unitary executive, which are fairly minimal: "removal, a power to act in their stead, and a power to nullify their acts when the President disapproves." Calabresi & Prakash, *supra* note 89, at 595 (citing Steven G. Calabresi & Keven H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1166 (1992)).

<sup>94</sup> *See, e.g.,* Saikrishna Banglor Prakash, *Fragmented Features of the Constitution's Unitary Executive*, 83 MINN. L. REV. 1143, 1155-56 (1999).

restrict the president's power to fire or punish lower-level subordinates who fail to carry out his policies.<sup>95</sup> Congress has created thousands of offices whose occupants are protected by for-cause rules, and the Supreme Court has for the most part approved these actions despite the unitary executive theory.<sup>96</sup> While Justice Scalia saw the independent counsel statute as fundamentally altering the interbranch equilibrium, a more accurate view is that the statute marked a modest reduction in the president's executive power, hardly detectable against the background noise of countless adjustments to the scope of executive power over the centuries.

Nor has anyone contended that the president can use *any means* to control executive branch officials. It has never been suggested, as far as we know, that the president enjoys the constitutional authority to reward and punish executive-branch officers by giving them bonuses or subjecting them to fines without authorization from Congress. These types of rewards and punishments are essential to control of subordinates in the commercial world; yet the president enjoys no constitutional entitlement to use them on his own subordinates. In practice, then, the president's ability to control his subordinates is limited.

The unitary executive theory also does not imply that the president can use his executive power to pursue *any ends*. The president would commit treason if he sought to stop an investigation in order to prevent the unmasking of an enemy spy in a time of war. The president would commit bribery if he called off an investigation in exchange for a payment from a suspect. This much is apparent from the fact that treason and bribery are impeachable offenses and from the fact that the impeachment judgment clause clearly contemplates the possibility of prosecuting a former president for offenses that led to his removal.<sup>97</sup>

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<sup>95</sup> See Peter. L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 45 WILLAMETTE L. REV. 701, 704 (2009).

<sup>96</sup> See, e.g., *Humphrey's Executor v. United States*, 295 U.S. 602, 619–620, 632 (1935) (holding that Congress may restrict the power of the president to remove officers of independent agencies).

<sup>97</sup> See U.S. CONST. art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: *but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.*" (emphasis added)). One might also argue that explicit immunity provisions elsewhere in the Constitution imply that the president is not immune from criminal liability for offenses committed while in office. The Constitution provides that Senators and Representatives cannot be arrested—except for treason and breach of the peace—while attending or traveling to or from a legislative session, and it grants them immunity for anything said in a speech or debate in the Senate or House. See U.S. CONST. art. I, § 6, cl. 1. Then-Solicitor General Robert Bork concluded in a 1973 memo that "[s]ince the Framers knew how to, and did, spell out an immunity, the natural inference is that no immunity exists where none is

The president's enforcement discretion is limited by law in other ways as well. Congress can compel executive officials to regulate<sup>98</sup> and to enforce noncriminal statutes,<sup>99</sup> and the courts can issue injunctions against executive branch officials and hold them in contempt if they disobey those commands.<sup>100</sup> Whether the courts have jurisdiction to enjoin the president in his official capacity is less clear,<sup>101</sup> though the issue arises relatively rarely because most laws are enforced by executive-branch officials at or below the cabinet level rather than by the president himself. There are also background constitutional norms, including due process, that the president must obey.<sup>102</sup>

At the same time, it is widely accepted that the president has authority to refuse to enforce the law under certain circumstances. The president can very likely refuse to *defend* a law in a court that he believes to be unconstitutional,<sup>103</sup> and he can probably refuse to *enforce* a law against violators on grounds of unconstitutionality as well.<sup>104</sup> He can definitely allocate enforcement resources across laws (voting rights laws versus

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mentioned." See Mem. for the United States Concerning the Vice President's Claim of Constitutional Immunity 5, In re Proceedings of the Grand Jury Impaneled December 5, 1972, Application of Spiro T. Agnew, Vice President of the United States, No. 73-965 (D. Md. filed Oct. 5, 1973), reprinted in Eric M. Freedman, *On Protecting Accountability*, 27 HOFSTRA L. REV. 677, 775, 779 (1999).

<sup>98</sup> See Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on Marbury v. Madison, Executive Inaction and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 276 (2003).

<sup>99</sup> See, e.g., In re Aiken County, 725 F.3d 255, 393–94 (D.C. Cir. 2013) (granting a writ of mandamus against the Nuclear Regulatory Commission instructing it to comply with an act of Congress).

<sup>100</sup> See, e.g., Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, HARV. L. REV. (forthcoming 2017).

<sup>101</sup> The Supreme Court has said that it "has no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992) (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867)). It has also held that as a matter of statutory interpretation, the president is not subject to the Administrative Procedure Act, which constrains subordinate executive branch officials. See *id.* at 796. But it has "left open the question of whether the President might be subject to a judicial injunction requiring the performance of a purely 'ministerial' duty," and it has said that the president is not entirely immune from criminal process. See *id.* at 802.

<sup>102</sup> See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>103</sup> See Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), <https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act> (informing Speaker Boehner that President Obama determined that the Defense of Marriage Act was unconstitutional and that Department of Justice attorneys would no longer defend the constitutionality of the statute in court).

<sup>104</sup> See *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring) (citing Frank Easterbrook, *Presidential Review*, 40 CASE W. L. REV. 905, 920–24 (1990)).

corporate fraud laws), or types of law enforcement (prosecution of drug kingpins versus users).<sup>105</sup> He can set priorities and areas of focus. He may be able to refuse to enforce certain laws wholesale even if he disapproves of them merely on policy grounds, but this last proposition is the subject of heated and inconclusive debate. The extent of his discretion will likely depend on whether we are talking about civil law or criminal law, and whether Congress has tried to constrain him or not.<sup>106</sup>

The ambiguity of the limits on the president's enforcement power reflect an uneasy compromise among constantly-evolving policy considerations. The enforcement power must be, to a large degree, discretionary because of the nature of our legal system. Congress has passed many more laws than could be enforced in a mechanical way, and there does not seem to be any neutral, judicially enforceable standard for allocating enforcement resources among laws. Once it is recognized that law enforcement must be discretionary, the normative question about whether executive-branch officials should exercise discretion is settled. It implies ought. But theorists have made a virtue of this necessity. They argue that because the president sits atop the executive, and is subject to electoral constraints, he is the best person to bear the responsibility of enforcing the law in the public interest.<sup>107</sup> There is also the thought that if Congress can constrain the president's enforcement power, the president would not serve as a check on legislative tyranny.<sup>108</sup>

The countervailing worry is that the president may abuse his enforcement discretion. Of course, it was this worry, which seemed more than justified in the wake of Watergate, that led to enactment of the independent counsel statute in the first place. But concerns about abuse of power extend beyond narrow cases of self-dealing and protection of political allies. Democrats argued that President Reagan exceeded his executive authority by failing to enforce environmental laws,<sup>109</sup> and—two decades later—that President George W. Bush stretched the limits of his constitutional power through lackluster enforcement of civil rights statutes.<sup>110</sup> Republicans argued

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<sup>105</sup> See Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 515-16 (2017).

<sup>106</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . .").

<sup>107</sup> See *Morrison v. Olson*, 487 U.S. at 728-29 (Scalia, J., dissenting) (arguing that "the primary check against prosecutorial abuse is a political one" and that concentrating executive power in the President maximizes political accountability).

<sup>108</sup> See *id.* at 713-14.

<sup>109</sup> See Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. L. REV. 1119, 1125-30 (2015) (summarizing debate over Reagan administration nonenforcement).

<sup>110</sup> See Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4

that President Obama violated the take care clause by failing to deport large classes of illegal immigrants after Congress rejected a law that would have given them a path to citizenship.<sup>111</sup> Critics of executive power worry that if the president's enforcement discretion is truly plenary, then he can effectively veto laws that he does not like—at least, for the duration of the administration—even if an actual veto has been overridden.<sup>112</sup> Such a view may seem inconsistent with the text of the Constitution, which gives primary policy-making authority to Congress. It is even more clearly inconsistent with the goals of the founders, who rejected a proposal to give the president “dispensing” power—the power to suspend laws—which was a controversial feature of the executive power in the hands of the British king before the Glorious Revolution.<sup>113</sup>

Hence the dialectic between power and constraint. The president should enjoy some core discretionary power but he cannot go too far.<sup>114</sup> The Obama-era controversies have given rise to a rough sense that the president cannot control law enforcement in such a way as to make “policy” that Congress has rejected. But that intuition still has not been fully articulated in a satisfactory way.

The debate over presidential enforcement runs parallel to arguments regarding the discretionary power of lower-level prosecutors. Courts sometimes say that federal prosecutors, or the attorney general, enjoy absolute discretion to decide whether to pursue charges in criminal cases.<sup>115</sup>

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DUKE J. CONST. LAW & PUB. POL'Y 77, 81-82 (2009).

<sup>111</sup> See Brief of Governor Abbott, Governor Bentley, Governor Christie, Governor Dugaard, Governor Martinez, and Governor Walker as Amici Curiae in Support of Respondents at 5, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674) (arguing that the president's Deferred Action for Parental Accountability (DAPA) rule constitutes “an unconstitutional dispensation of the [Immigration and Nationality Act] under the Take Care Clause”).

<sup>112</sup> Markowitz, *supra* note 105, at 492 (“Taken to its extreme, the power not to enforce could act as a constitutionally suspect second veto for a broad swath of legislation.”).

<sup>113</sup> See Carolyn A. Edie, *Tactics and Strategies: Parliament's Attack Upon the Royal Dispensing Power 1597–1689*, 29 AM. J. LEGAL HIST. 197, 198–99 (1985) (describing the crown's dispensing power).

<sup>114</sup> See Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1711 (2004) (“Courts should review those claims that challenge particular nonenforcement decisions for lack of adequate explanation tending to indicate the absence of relevant factors or the presence of impermissible ones . . .”).

<sup>115</sup> See, e.g., *United States v. Cox*, 342 F.2d 167, 171 (5<sup>th</sup> Cir. 1965) (“[T]he courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.”). See also, *Wayte v. United States*, 470 U.S. 598, 607 (1985) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”); *Smith v. United States*, 375



But such claims are overbroad. The courts have acknowledged that constitutional limitations, including due process, apply to prosecutorial discretion.<sup>116</sup> The Supreme Court has declared that the prosecutor must be “disinterested.”<sup>117</sup> Numerous cases confirm that the principle of prosecutorial discretion does not entitle the prosecutor to bring charges when she has a conflict of interest.<sup>118</sup> Likewise, constitutional tort claims can be brought against prosecutors for extreme abuses of prosecutorial discretion, for example, when they agree to drop cases in return for bribes or sexual favors, or when they demand that a defendant swear a religious oath.<sup>119</sup>

It is true that complaints about abuse of prosecutorial discretion typically lead to judicial remedies when prosecutors bring cases, not when they refuse to bring cases. For obvious reasons, criminal defendants never try to persuade the court to compel the prosecutor to bring charges against other people, in order to produce equality of outcomes but not an outcome desired by the defendant. The pattern might cause one to think that the law gives more freedom to prosecutors not to bring cases than to bring cases. But the law has never been defined this way.<sup>120</sup> The pattern reflects a remedial asymmetry. When a defendant complains about a prosecutor’s bias, a court can easily offer a remedy by releasing the defendant or ordering the prosecutor off the case. When a prosecutor’s bias results in a failure to bring a case, it is harder for the court to do anything about it. Judges, as they have recognized, are in a poor position to order prosecutors to bring cases, which would require the court to supervise the case to ensure that the prosecutor does not skimp on effort or resources.<sup>121</sup> But this asymmetry does not mean that a biased prosecutor’s refusal to bring charges is lawful; rather, it is illegal

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F.2d 243, 247 (5th Cir. 1967) (citations omitted) (“The discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute.”); *Shade v. Pennsylvania, Department of Transportation*, 394 F. Supp 1237, 1241 (M.D. Penn. 1975) (citations omitted) (“[T]he discretion to choose which statute to prosecute under is vested in the prosecuting attorney.”).

<sup>116</sup> See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)).

<sup>117</sup> *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987).

<sup>118</sup> See, e.g., *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967) (holding that the prosecutor’s conflict of interest “violate[d] the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment”).

<sup>119</sup> See, e.g., *Bernard v. County of Suffolk*, 356 F.3d 495, 504 (2nd Cir. 2004) (citing *Schloss v. Bouse*, 876 F.2d 287, 291–92 (2nd Cir. 1989); and *Doe v. Phillips*, 81 F.3d 1204, 1210 (2d Cir. 1996)).

<sup>120</sup> The law, 28 U.S.C. § 528, and DOJ regulations do not make this distinction but forbid any kind of conflict of interest, regardless of its effect on prosecutors’ decisions.

<sup>121</sup> *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (“Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts.”).

but hard to remedy.

With respect to the scope of the president's enforcement discretion, these precedents involving lower-level prosecutors are instructive, but they are not determinative. One can certainly argue that the president, given the greater breadth of his portfolio and his more direct accountability to the electorate, ought to have wider discretion over enforcement decisions than a lower-level prosecutor might. Roger Taney, who subsequently served as chief justice and ensured his own infamy as the author of the *Dred Scott* decision, articulated an early version of this argument while he was President Jackson's attorney general.<sup>122</sup> President Jackson had directed a federal prosecutor to drop a controversial case involving jewels that were stolen from a Dutch princess. The secretary of state asked the attorney general whether the president's action was lawful. In his *Jewels of the Princess Orange* opinion, Taney concluded that it was. While conceding that it would have been improper for the prosecutor to dismiss the case on his own,<sup>123</sup> Taney said that it was "within the legitimate power of the President to direct [the prosecutor] to institute or to discontinue a pending suit . . . whenever the interest of the United States is directly or indirectly concerned."<sup>124</sup>

Yet notably, neither Taney in *Jewels of the Princess Orange* nor Scalia in *Morrison* argued that the president's prosecutorial discretion grants him the power to pursue or drop a case for any reason whatsoever.<sup>125</sup> Other advocates of the unitary executive theory do not make that claim either, and such an argument would be inconsistent with the constitutional framework. As we have noted above, the founders anticipated that the laws against treason and bribery would apply to the president, and that the president might be prosecuted after impeachment and removal for committing those offenses while in office. The founders further anticipated that Congress would define other "high crimes" that might form the basis for the president's

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<sup>122</sup> The *Jewels of the Princess of Orange*, 2 Op. Att'y Gen. 482 (1831).

<sup>123</sup> See 2 Op. Att'y Gen. at 490 ("[A]s matters now stand, [the federal district attorney and the court] could not, with propriety, act on their own judgment, without previously understanding the views entertained by the Executive; and the prosecution must go on, even if, in point of fact, it is groundless and unjust, unless the President may lawfully interfere, and authorize and direct the district attorney to strike it off.").

<sup>124</sup> *Id.* at 492; see also Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1052 (2013) (stating that Taney's opinion "illustrates the degree to which enforcement decisions regarding the most pressing issues facing the country have been thought to be at the core of the President's authority and responsibility").

<sup>125</sup> Justice Scalia suggested that the foreign relations consequences of a law enforcement action should be relevant to the exercise of prosecutorial discretion. But while he said that such considerations could be considered "political," he emphasized that they were political "in the nonpartisan sense." See *Morrison*, 487 U.S. at 708 (Scalia, J., dissenting). Thus, even Justice Scalia appeared to accept the proposition that intervening in an investigation for partisan purposes would be improper.

impeachment, removal, and subsequent prosecution. Since obstruction of justice is one such crime, and one very much like certain kinds of bribery, it would seem to apply to the president as well. At the same time, as the analysis above illustrates, it cannot be applied to the president without some accommodation for his unique role in the constitutional scheme.

### *C. Historical Precedents*

The obstruction allegations against President Trump do not present the first time in modern American history that a sitting president or high-ranking White House officials have been accused of obstruction. In this section we review four previous episodes involving accusations of obstruction by the president or his closest advisers: the Watergate scandal, the Iran-Contra affair, the impeachment of Bill Clinton, and the controversy over the firing of nine U.S. attorneys in 2006. These episodes provide support for the notions that a president who uses his position of power to obstruct a federal investigation or proceeding commits an impeachable offense, and that interference in a criminal investigation for partisan advantage falls within the definition of obstruction.

#### 1. Watergate

The first sitting president to face serious allegations of obstruction was Richard Nixon, who was accused of interfering with the FBI's investigation into the break-in at the Democratic National Committee's Watergate headquarters. The first article of impeachment reported out by the House Judiciary Committee in July 1974 charged that Nixon had "prevented, obstructed, and impeded the administration of justice" through (among other means) "endeavouring to interfere with the conduct of investigations" by the Justice Department and the FBI and "endeavouring to misuse the Central Intelligence Agency."<sup>126</sup> The "smoking gun" in the Watergate scandal was a tape-recorded conversation from June 1972 in which Nixon and his chief of staff H.R. Haldeman concocted a plan to instruct the CIA deputy chief to tell the FBI director to call off the bureau's probe into the Watergate burglary.<sup>127</sup>

The vote on the first article of impeachment was 27-11, with six Republicans joining all 21 of the committee's Democrats in the majority.<sup>128</sup> After Nixon's resignation, however, all 11 Republicans who voted against

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<sup>126</sup> IMPEACHMENT OF RICHARD M. NIXON, *supra* note 2, at 2.

<sup>127</sup> Andrew Martin, *The Smoking Gun That Took Down Nixon: One From the History Books*, BLOOMBERG (May 16, 2017), <https://www.bloomberg.com/news/articles/2017-05-16/the-smoking-gun-that-took-down-nixon-one-from-the-history-books>.

<sup>128</sup> IMPEACHMENT OF RICHARD M. NIXON, *supra* note 2, at 10.

the first article of impeachment submitted a statement acknowledging that, in light of subsequent revelations, they believed that Nixon had committed obstruction.<sup>129</sup> Nixon himself, while contesting the factual allegations against him, acknowledged at a press conference prior to leaving office that “of course, the crime of obstruction of justice is a serious crime and would be an impeachable offense.”<sup>130</sup> Thus, while the Watergate affair did not result in a judicial ruling or a precedent of the full House or Senate to the effect that the crime of obstruction applies to presidential interference in a federal criminal investigation, the episode did reveal a bipartisan consensus—with which Nixon himself concurred—that the president did not stand above the obstruction laws.

There is a subtle question as to whether the Nixon case supports the view that the president can commit a *crime* of obstruction of justice or rather that obstruction by the president is a political offense that may justify impeachment but is not a crime. The eleven Republican minority members of the House Judiciary Committee who initially voted against impeachment but subsequently switched their views on the first article made clear that they took the former position: Nixon, in their final analysis, violated the criminal obstruction statutes.<sup>131</sup> One member who voted in favor of impeachment likewise voiced the view that Nixon’s obstruction was not only impeachable but also criminal.<sup>132</sup>

An alternative approach to the question of whether Nixon’s obstruction was a crime is to imagine what would have happened if Ford had not pardoned Nixon; would he have been convicted of obstruction? Probably:

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<sup>129</sup> *Id.* at 361 (statement of Representative Hutchinson et al.); *see also id.* at 493 (statement of Representative Mayne).

<sup>130</sup> The President’s News Conference (Mar. 6, 1974), in *THE AMERICAN PRESIDENCY PROJECT* (Gerhard Peters and John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=4377>.

<sup>131</sup> The minority members concluded:

We recognize that the majority of the Committee, as well as its Special Counsel, apparently do not consider it necessary or appropriate to charge impeachable offenses in terms of the violation of specific Federal criminal statutes, such as Title 18 U.S.C. § 371 (conspiracy), § 1001 (false statements to a government agency), or §§ 1503, 1505 and 1510 (obstruction of justice). . . . We disagree. To the contrary, we believe the evidence warrants the conclusion that the President did conspire with a number of his aides and subordinates to delay, impede and obstruct the investigation of the Watergate affair by the Department of Justice.

IMPEACHMENT OF RICHARD M. NIXON, *supra* note 2, at 382 (statement of Representative Hutchinson et al.).

<sup>132</sup> *See 1 Debate on Articles of Impeachment, Hearings of the H. Comm. on the Judiciary*, 93rd Cong., 2d Sess., at 307 (1974) (statement of Representative Railsback). It is not clear whether others who voted for the first article shared Representative Railsback’s view.

the pardon itself implies that Ford believed that Nixon faced criminal liability of some sort, but we do not know whether Nixon would have faced criminal liability for obstruction of justice rather than for other offenses. At a minimum, though, we know that at least a dozen members of the House Judiciary Committee did think that a president could commit the crime of obstruction. That is one point in favor of the view that obstruction laws apply to the president, though it falls well short of resolving the matter.

## 2. Iran-Contra

In November 1986, news broke that Reagan administration officials had facilitated the sale of weapons to the Iranian government and used some of the proceeds to finance the Contra rebels in Nicaragua, notwithstanding a congressional prohibition on aid to the Contras. Two Reagan administration officials—national security adviser John Poindexter and National Security Council staffer Oliver North—would be convicted of obstructing a congressional inquiry into the Iran-Contra affair, but their convictions were later vacated.<sup>133</sup> A third official, former Secretary of Defense Caspar Weinberger, was indicted for obstruction of justice in 1992 but pardoned by then-President George H.W. Bush before going to trial.<sup>134</sup>

During his investigation of the Iran-Contra affair, independent counsel Lawrence Walsh considered whether obstruction charges should be filed against President Reagan. Walsh ultimately decided not to pursue such charges, explaining that “the fundamental reason for lack of prosecutorial effort was the absence of proof beyond a reasonable doubt that the President knew that the statements being made to Congress were false, or that acts of obstruction were being committed by Poindexter, North and others.”<sup>135</sup> Walsh also considered obstruction charges against Edwin Meese, who served as attorney general under President Reagan from 1985 to 1988. Again, Walsh declined to prosecute Meese because of insufficient evidence, not because of any view that the attorney general’s prosecutorial discretion made him immune from obstruction liability.<sup>136</sup> Walsh added in his final report that the criminal investigation of George H.W. Bush—who served as vice president under Reagan and then succeeded him as president—was “regrettably

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<sup>133</sup> See *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990); *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991).

<sup>134</sup> See Walter Pincus, *Bush Pardons Weinberger in Iran-Contra Affair*, WASHINGTON POST (Dec. 25 1992), <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/28/AR2006032800858.html>

<sup>135</sup> I LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS: INVESTIGATIONS AND PROSECUTIONS ch. 27 (1993).

<sup>136</sup> *Id.* ch. 31.

incomplete.”<sup>137</sup>

The Iran-Contra affair differs from Watergate in an important respect: the obstruction allegations involved obstruction of congressional inquiries, and since the president does not have prosecutorial discretion with respect to congressional probes, the difficult questions concerning presidential obstruction that arise with respect to executive branch investigations did not come up in the Iran-Contra context. But most important for our purposes, the Watergate-era view that the president can commit obstruction does not appear to have been weakened.

### 3. The Impeachment of Bill Clinton

In December 1998, Bill Clinton became just the second president in American history to be impeached. One of the two articles of impeachment reported out of the House charged the president with obstruction of justice. The specific allegations in the House impeachment report were that Clinton encouraged former White House intern Monica Lewinsky and Oval Office secretary Betty Currie to give false testimony in a sexual harassment lawsuit against him, that he allowed his attorney to make false and misleading statements to a federal judge in the harassment suit, and that he lied to aides about his relationship with Lewinsky knowing that the aides would repeat those lies to a federal grand jury.<sup>138</sup>

The impeachment of President Clinton was controversial in many respects, and the Senate ultimately split 50-50 on the article of impeachment charging obstruction. Yet at no point during the impeachment proceedings was there debate as to whether presidential obstruction could be an impeachable offense or whether a president could be charged criminally for obstruction following removal. The House Judiciary Committee’s report said that the first article of impeachment against Nixon had established a “clear precedent” that a president who used his position of power to obstruct the administration of justice committed an impeachable offense.<sup>139</sup> The Judiciary Committee report also concluded that Clinton’s obstruction of a pending federal judicial proceeding was a crime within the scope of section 1503.<sup>140</sup> Democrats on the House Judiciary Committee disputed the factual allegations against Clinton but did not dispute the majority’s claim that presidential obstruction is a potentially impeachable and criminal offense.<sup>141</sup>

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<sup>137</sup> *Id.* ch. 28.

<sup>138</sup> IMPEACHMENT OF WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 105-830, at 63–74 (1998).

<sup>139</sup> *Id.* at 119.

<sup>140</sup> *See id.* at 64, 120–21.

<sup>141</sup> *See id.* at 243–57 (minority views).

The view that presidential obstruction is both impeachable and criminal emerges even more clearly from the Senate proceedings. The trial memorandum submitted by the House to the Senate argued that President Clinton's conduct "might easily have been charged under [the obstruction] statutes."<sup>142</sup> President Clinton's brief to the Senate also acknowledged section 1503 as providing the "applicable law."<sup>143</sup> Senators from both parties, including supporters and opponents of Clinton's removal, recognized in floor statements that section 1503 applied to the president (though they disagreed as to whether the president had violated the provision).<sup>144</sup> A letter from more than 430 law professors opposing impeachment nonetheless agreed that "obstructing justice can without doubt be impeachable" as well as criminal.<sup>145</sup> The professors argued that "making false statements about sexual improprieties is not a sufficient constitutional basis to justify the trial and removal from office of the President of the United States," but they emphasized that—by contrast—a "President who corruptly used the Federal Bureau of Investigation to obstruct an investigation would have criminally exercised his presidential powers."<sup>146</sup>

As in Iran-Contra, most of the presidential obstruction questions in the Clinton case did not involve the same questions of prosecutorial discretion that we discuss in section I.B. The allegations against Clinton centered around obstruction of the administration of justice in a civil proceeding initiated by a private citizen, rather than interference with an executive branch investigation. Insofar as Clinton obstructed a grand jury inquiry, it was the independent counsel—and not a prosecutor under the president's control—who was spearheading the investigation. Nonetheless, we think it relevant that Clinton's accusers and defenders both accepted the proposition that a president who uses his position of power to obstruct an investigation thereby commits an impeachable offense and a crime.

<sup>142</sup> S. Doc. 106-14, at 813 (1999) (Trial Mem. of the U.S. House).

<sup>143</sup> See *id.* at 961 (Trial Mem. of President Clinton).

<sup>144</sup> See S. DOC. 106-4, at 2580 (statement of Sen. Biden) ("If your aim is to respect the rule of law, you must also respect the rules of law—the precise legal definitions of the crimes, as found in . . . 18 U.S.C. §§ 1503 and 1512, the applicable Federal obstruction of justice statutes"); *id.* at 2596-97 (statement of Sen. Frist); *id.* at 2780 (statement of Sen. Thompson); *id.* at 2926-27 (statement of Sen. Feingold); *id.* at 3077 (statement of Sen. Hatch); *id.* at 3113 (statement of Sen. Reed).

<sup>145</sup> Bernard J. Hibbitts, *More Than 430 Law Professors Send Letter to Congress Opposing Impeachment*, JURIST (Nov. 6, 1998), <https://web.archive.org/web/19990128143405/http://jurist.law.pitt.edu/petit1.htm> (reproducing letter).

<sup>146</sup> *Id.*

#### 4. Dismissal of U.S. Attorneys Under George W. Bush

The dismissal of nine U.S. attorneys by President George W. Bush in 2006 provided the most recent occasion (prior to Trump's tenure) for considering the interaction between prosecutorial discretion and criminal obstruction. The most controversial of these dismissals was that of David Iglesias as U.S. attorney in the District of New Mexico.<sup>147</sup> According to a subsequent Justice Department report, several New Mexico Republicans had pressured Iglesias to investigate voter fraud allegations more aggressively and to bring an indictment against former Democratic state senator Manny Aragon prior to the November 2006 election. In December of that year, after Iglesias had failed to bring charges against the Democratic politician, a senior official in the Bush administration Justice Department asked Iglesias to resign. Iglesias stepped down later that month. The acting U.S. attorney who replaced Iglesias brought charges against Aragon in March of the following year.<sup>148</sup>

In September 2008, the Justice Department's Office of the Inspector General and Office of Professional Responsibility released a report on the firing of Iglesias and the eight other U.S. attorneys. The report recommended the appointment of a special counsel to investigate the Iglesias firing more fully.<sup>149</sup> The report went on to say:

While we found no case charging a violation of the obstruction of justice statute involving an effort to accelerate a criminal prosecution for partisan political purposes, we believe that pressuring a prosecutor to indict a case more quickly to affect the outcome of an upcoming election could be a corrupt attempt to influence the prosecution in violation of the obstruction of justice statute. The same reasoning could apply to pressuring a prosecutor to take partisan political considerations into account in his charging decisions in voter fraud matters.<sup>150</sup>

Then-Attorney General Michael Mukasey appointed a federal prosecutor from Connecticut to conduct an investigation into Iglesias's firing. The special prosecutor's investigation ended in 2010 without any criminal charges being filed. A letter from the Justice Department to the chairman of

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<sup>147</sup> OFFICE OF THE INSPECTOR GENERAL & OFFICE OF PROFESSIONAL RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 42 (2008).

<sup>148</sup> *See id.* at 155-86.

<sup>149</sup> *Id.* at 198.

<sup>150</sup> *Id.* at 199.



the House Judiciary Committee relayed the special prosecutor's conclusion that the evidence was "insufficient to establish an attempt to pressure Mr. Iglesias to accelerate his charging decisions."<sup>151</sup>

The Iglesias episode is likely to go down in history as a footnote. But even as a footnote, it supports an important proposition: at least in the view of the Justice Department, public officials can commit the crime of obstruction not just by thwarting an investigation for political reasons but by propelling an investigation forward for political ends.<sup>152</sup>

#### *D. Synthesizing the Obstruction Statutes and Article II*

The primary challenge in applying the obstruction statutes to the president comes in defining the mens rea of "corruptly" in a manner that respects the president's role as the head of the executive branch. Recall that Congress and the courts have construed "corruptly" to refer to "improper purpose." The president does not act corruptly when his actions follow from a good-faith effort to fulfill his constitutional responsibilities. For example, if the president interferes with an investigation because he thinks it might reveal the identity of an undercover intelligence operative abroad, or because he worries it might bring us to the brink of war with a hostile nation, his actions follow from an appropriate conception of his commander-in-chief responsibilities and so cannot constitute obstruction. So too, when the president intervenes because he believes that an investigation amounts to a waste of scarce enforcement resources, his actions follow from his responsibilities under the take care clause and are likewise noncriminal.<sup>153</sup>

This is not to suggest that the president must justify each exercise of prosecutorial discretion by drawing a link back to a particular provision of Article II. As the Supreme Court noted in the 1996 case of *United States v. Armstrong*:

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<sup>151</sup> Letter from Ronald Weich, Assistant Att'y Gen., U.S. Dep't of Justice, Office of Legislative Affairs, to Hon. John Conyers, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives (July 21, 2010), <http://legaltimes.typepad.com/files/conyers.dannehy.ola.resp.pdf>.

<sup>152</sup> It might seem odd to say that *advancing* an investigation could be an obstruction of justice. One possible interpretation of the government view is that bringing a case that was not justified interferes with the "due administration of justice" because it could result in a wrongful conviction. Another interpretation is that the obstruction consisted of bringing a case before it was ready, risking the acquittal of a guilty party in order to obtain the short-term political advantage of a public indictment shortly before an election (rather than a conviction after it).

<sup>153</sup> *Cf. Cmty. for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) (Bork, J.) ("The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws.").

The Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws. They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to "take Care that the Laws be faithfully executed." As a result, the presumption of regularity supports their prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.<sup>154</sup>

If the presumption of regularity attaches to the prosecutorial decisions of the attorney general and the U.S. attorneys because they are the president's delegates, then that presumption applies to the prosecutorial decisions of the president as well. But the presumption of regularity is not irrebuttable: it may be overcome, for example, by showing that the official actions were "in violation of prescribed procedures."<sup>155</sup> That is, one begins from the premise that the president intervened in the investigation to carry out his Article II responsibilities, and one usually ends there—but not always.

When might a president's intervention in an investigation or other proceeding overcome the presumption of regularity? The Justice Department's regulations for prosecutors provide a starting point for thinking about this problem. They forbid a prosecutor to take part in an investigation where she has a "personal or political relationship" with the subject or someone connected with the investigation.<sup>156</sup> Political relationship means "a close identification with an elected official, a candidate (whether or not successful) for elective, public office, a political party, or a campaign organization."<sup>157</sup> Personal relationship "means a close and substantial connection of the type normally viewed as likely to induce partiality."<sup>158</sup> A prosecutor is "presumed to have a personal relationship with his father, mother, brother, sister, child and spouse."<sup>159</sup> Involvement in such investigations is improper because the prosecutor will be tempted to interfere with the normal course of law enforcement.<sup>160</sup> These regulations operate

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<sup>154</sup> *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (citations and some internal quotation marks omitted).

<sup>155</sup> *Wilson v. United States*, 369 F.2d 198, 200 (D.C. Cir. 1966).

<sup>156</sup> 28 C.F.R. § 45.2(a) (2017). The regulation is authorized by a statute that directs the attorney general to disqualify Justice Department employees from cases in which they have conflicts of interest. 28 U.S.C. § 528 (2012).

<sup>157</sup> 28 C.F.R. § 45.2(c)(1).

<sup>158</sup> *Id.* § 45.2(c)(2).

<sup>159</sup> *Id.*

<sup>160</sup> *See id.* § 45.2(b). If an employee's supervisor determines that the employee has a personal or political relationship with the person under investigation, the employee may not participate in the investigation unless the supervisor determines that the relationship will not affect the impartiality of the employee's service and that "[t]he employee's participation

against the backdrop of a federal conflict-of-interest statute that imposes criminal penalties<sup>161</sup> upon federal officers and employees who “participate[] personally” in matters in which they, their spouses, or their minor children have a “financial interest.”<sup>162</sup>

The president differs from a prosecutor in several ways. First, he has a political relationship with far more people, including almost every major official in the executive branch and every important member of his party. This suggests a worry: if the obstruction statutes are applied to the president, he must recuse himself from countless investigations where there may be a valid public reason to intervene. Second, however, the president is almost never directly involved in an investigation. Because of the nature of his position, he does not have the time or inclination; typically, he takes part in law enforcement by setting priorities and making appointments.<sup>163</sup> While he needs to have the freedom to set the priorities, he can also often recuse himself from individual investigations without sacrificing too much executive authority. Third, the president, unlike a prosecutor, is responsible for national security, public order, and other important areas of national life, and plays a significant role in setting public policy. He therefore needs flexibility to block investigations that interfere with the broad public interest.

Thus, while an argument could be made that the president obstructs justice whenever he interferes with an investigation in a way that is not consistent with his constitutional and legal role, this seems to us too broad because the outer limits of the president’s authority are ambiguous and subject to disagreement. A more sensible approach would apply the obstruction statutes narrowly to cases where there is no serious claim that the president’s motive is consistent with his public role. The presumption of regularity would apply except when the president seeks to advance interests

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would not create an appearance of a conflict of interest.”

<sup>161</sup> See 18 U.S.C. § 208(a) (violators subject to penalties under § 216); *cf.* 18 U.S.C. § 216(a)(2) (penalty of up to five years imprisonment for willful violation).

<sup>162</sup> 18 U.S.C. § 208(a). Note that the definition of “officer” here does not include the president, vice president, members of Congress, or federal judges. See 18 U.S.C. § 202(c).

<sup>163</sup> A recent example is the different approach to drug law enforcement of the Obama and Trump administrations. See U.S. DEP’T OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, MEMORANDUM FOR ALL FEDERAL PROSECUTORS: DEPARTMENT CHARGING AND SENTENCING POLICY (2017), <https://www.justice.gov/opa/press-release/file/965896/download> [<https://perma.cc/7EQW-EMAF>] (instructing prosecutors to “charge and pursue the most serious provable offense,” and thereby maximize criminal penalties); U.S. DEP’T OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GENERAL, MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: GUIDANCE REGARDING MARIJUANA ENFORCEMENT (2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/M6ZT-3JGV>] (instructing Department of Justice employees to leave enforcement of low-level marijuana offenses to local authorities).

that are narrowly personal (e.g., in the well-being of family members), pecuniary (e.g., in the procurement of a bribe), or partisan (e.g., in winning the next election or in aiding the electoral prospects of a party member).

This conclusion is informed not only by the ethical and legal guidelines applicable to prosecutors, but also by structural inferences drawn from the Constitution. The founders acknowledged the impropriety of a public official participating in a proceeding in which he has a personal stake: hence the rule that the chief justice, rather than the vice president, presides over the Senate trial of an impeached president.<sup>164</sup> The vice president—who normally presides over the Senate<sup>165</sup>—would have an obvious personal stake in the president’s trial because the vice president is next in the order of succession. The founders also included a number of constitutional provisions designed to combat financial conflicts of interest, including the Ineligibility Clause<sup>166</sup> and the Foreign<sup>167</sup> and Domestic Emoluments Clauses.<sup>168</sup> And while the Constitution does not specifically regulate the use of public office for partisan purposes, that is probably because the founders envisioned a Republic without parties. Believing parties to be a “political evil,”<sup>169</sup> they certainly would have thought it improper for the president to use his position of power in pursuit of narrowly partisan ends.

Translating these structural inferences into a legal standard for presidential obstruction of justice is not an entirely straightforward exercise. But this is precisely the exercise that a court would have to undertake in the event that a president (or former president) is prosecuted on charges that he committed obstruction while in office. We suggest that the following

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<sup>164</sup> See U.S. CONST. art. I, § 3, cl. 6.

<sup>165</sup> *Id.* art. I, § 3, cl. 4.

<sup>166</sup> See U.S. CONST. art. I, § 6, cl. 2 (“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office . . . the Emoluments whereof shall have been increased during such time . . .”). Thus, if Congress votes to raise the pay of a federal office, no member of Congress can serve in that office until after the end of her term.

<sup>167</sup> See *id.* art. I, § 9, cl. 8 (“[N]o person holding any office of profit or trust under [the United States], shall, without the consent of the Congress, accept of any present [or] emolument . . . of any kind whatever, from any king, prince, or foreign state.”). For further discussion, see generally Andy Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. (forthcoming 2017), available at <https://ssrn.com/abstract=2902391>; and John Mikhail, *The Definition of 'Emolument' in English Language and Legal Dictionaries, 1523-1806* (July 12, 2017) (unpublished manuscript), <https://ssrn.com/abstract=2995693>.

<sup>168</sup> See U.S. CONST. art. II, § 1, cl. 7 (“The President . . . shall not receive . . . any other Emolument from the United States, or any of them.”). On the Ineligibility and Emoluments Clauses as anti-conflict-of-interest provisions, see generally Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 358-62 (2009).

<sup>169</sup> JAMES REICHLEY, *THE LIFE OF THE PARTIES: A HISTORY OF AMERICAN POLITICAL PARTIES* 26 (2000).

standard best synthesizes the legal materials we have examined: *A president commits obstruction of justice when he significantly interferes with an investigation, prosecution, or other law enforcement action to advance narrowly personal, pecuniary, or partisan interests.* He does not, however, commit obstruction when he acts on the basis of a legitimate and good-faith conception of his constitutional responsibilities, even if he receives a personal or pecuniary benefit or incidentally advances his party's interests.

We address questions of mixed motives at greater length in section II.A. For now, let us define some of the terms. "Significant interference" means a direct order to a responsible subordinate (like an FBI agent or Justice Department lawyer) to drop an investigation, prosecution, or other law enforcement activity, or ensure that it is not completed to professional standards. Significant interference could also take place less directly—for example, by conveying the order through intermediaries. And significant interference need not be limited to thwarting an investigation: a president might interfere with an investigation, we suppose, by ordering a subordinate to bring an indictment against a political opponent on the eve of an election when the facts do not support those charges, as was suggested (but not proven) in the Iglesias case.

We would define "personal," "pecuniary," and "partisan" interests narrowly. The president would be guilty of obstruction if he significantly interferes with an investigation because he believes that it will likely bring to light evidence of criminal activity or other wrongful or embarrassing conduct by himself, his family members, or his top aides. This would not require proof of any underlying offense or misdeed. As we have emphasized above, one can obstruct an investigation that is headed toward a dead end.<sup>170</sup> At the same time, a president who interferes with an investigation because he knows there is no fire underneath the smoke might justify his intervention on the grounds that the probe was a waste of law enforcement resources.

Family members, in our view, should include first-degree blood relations, as is the case under the Justice Department's recusal rules for federal prosecutors.<sup>171</sup> Of course, applications will vary case by case. Interfering with an investigation in order to protect a son-in-law with whom the president is particularly close might constitute obstruction. The Justice Department's recusal regulation is again instructive: it prescribes that "[w]hether relationships (including friendships) . . . are 'personal' must be judged on an individual basis," with "due regard" for the subjective opinion of the prosecutor whose objectivity is under challenge.<sup>172</sup>

Our standard would apply both where the family member or aide is

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<sup>170</sup> See *supra* note 30 and accompanying text.

<sup>171</sup> See 28 C.F.R. § 45.2(c)(2).

<sup>172</sup> See 28 C.F.R. § 45.2(c)(2).

the subject of the investigation, and where the family member or aide is not the subject of the investigation but could be embarrassed by the outcome of the investigation even if he or she never engaged in criminal activity. For example, the president would violate the obstruction statutes by blocking an investigation because he thinks it might bring to light negative information about a top aide, a family member, or the president himself. He would likewise commit obstruction if he blocked an investigation of a top aide based on personal friendship toward that individual. A more difficult question is presented if the president interferes in an investigation because he believes that the target of the probe has served the nation admirably and is worthy of mercy. The use of the pardon power under these circumstances would be proper. As discussed below, however, we do not think that the existence of the pardon power justifies the surreptitious obstruction of an ongoing inquiry.<sup>173</sup>

For cases in which the president orders a subordinate to bring baseless charges against a target, we would likewise define the scope of the obstruction statutes conservatively. Circumstances that might qualify would include a president directing a prosecutor to bring unfounded charges against a political opponent in the run-up to an election, or against an estranged spouse in order to gain an upper hand in a divorce dispute. Again, the court (or the jury) would need to be convinced that the president's intervention was motivated by personal or partisan interests—and not by a good-faith if controversial view of what the public interest required.

As for circumstances in which the president's intervention might amount to obstruction because it was motivated by pecuniary interests, our analysis is informed by case law construing the federal bribery and extortion statutes.<sup>174</sup> Under those provisions, a president commits a crime if he intervenes in an investigation as part of a quid-pro-quo exchange for a contribution to his reelection campaign,<sup>175</sup> or—as we discuss below<sup>176</sup>—a donation to his presidential library. Because obstruction for pecuniary purposes overlaps with conduct already criminalized by other statutes, our focus here is on circumstances in which the president acts for personal or partisan rather than pecuniary reasons, and so would not be liable under the bribery and extortion laws.

The most difficult questions arise when the president is accused of obstructing justice for partisan ends. The president is the leader of his party as well as the leader of the country, and it is accepted that he can use the powers of his office to advance his party's interests as well as his own

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<sup>173</sup> See *infra* Section III.B.

<sup>174</sup> See 18 U.S.C. § 201 (bribery); § 872 (extortion); § 1951 (Hobbs Act).

<sup>175</sup> See *McCormick v. United States*, 500 U.S. 257, 273-74 (1991).

<sup>176</sup> See *infra* notes 202-206 and accompanying text.

political interest in being reelected or succeeded in office by a chosen successor. The distinction we seek to make is between actions that are consistent with the ideal of political competition and those that are not. The former include actions that benefit the president or his party politically because they advance a policy agenda of which the public approves. The latter include actions that benefit the president or his party by making it difficult for political opponents to make their case to the public.

To understand this distinction, consider three scenarios: (1) a president orders the Justice Department to stop prosecuting cases involving possession and distribution of marijuana because he considers such efforts to be a poor use of scarce enforcement resources; (2) a president orders the Justice Department to stop prosecuting cases involving the possession and distribution of marijuana because he believes a “soft on pot” policy will draw younger voters to his party; and (3) a president orders the Justice Department to drop a case involving possession and distribution of marijuana by a senator from his own party who stands for reelection the next month.

In the first scenario, the president would not be guilty of obstruction. As we have argued above, the president’s obligation to “take care that the laws be faithfully executed” means that in certain circumstances he must prioritize the enforcement of some laws over others, based on policy considerations. Moreover, the president’s power over enforcement serves as a check against congressional overcriminalization. Thus the president also might, in some cases, choose to drop enforcement actions against people who violated a sedition law, who evaded the draft, who have entered the country illegally, and who have failed to pay their taxes. Constraints on these types of non-enforcement, if any, would come from the constitutional norms discussed above.

The third scenario is also straightforward: the president acts improperly—and thus corruptly—when he uses prosecutorial power to harass his political enemies while sparing his friends. Of course, if the president adopted a broad policy of prosecutorial forbearance in marijuana possession and distribution cases, then applying that broad policy to a partisan ally would not amount to obstruction. What the president cannot do is to abuse his position of power to distort electoral outcomes by enforcing generally applicable laws only against political enemies.

The second scenario is closer. Let us assume that the president writes a memo clearly stating that his *only* reason for adopting the “soft on pot” policy is to win votes—he thinks it is otherwise a bad policy. Imagine that he also observes that the policy would throw the opposing party into turmoil, destroying its electoral prospects for years to come. Isn’t his motive “narrowly partisan”? We think that the president’s motive is legitimate. One can argue (though not all would agree) that presidents *should* adopt policies

that the public broadly supports, as long as these policies do not exceed constitutional limits.<sup>177</sup> What the president cannot do is single out targets of law enforcement for harassment or immunity based on their partisan leanings. This type of partisan or political discrimination undermines political competition by forcing the party out of power to devote resources to fend off prosecutions and other enforcement actions based on behavior that is no different from that of the president's supporters—or, potentially, coerces opponents into silence so that they can avoid the president's wrath.

Our standard also does not result in criminal liability for the president if the president blocks an investigation or prosecution that would have personally embarrassed or harmed a prior president of the opposite party. For example, President Obama's decision not to prosecute former Bush administration officials for torture<sup>178</sup> does not count as obstruction of justice. Obama's motive was, apparently, to avoid criminalizing political differences—an important norm in democratic politics. But what if his real motive was to avoid partisan attacks that might have jeopardized his legislative priorities and threatened his presidency? The decision not to prosecute begins to seem partisan rather than public-spirited. While this case is nearer to the line, we think that the obstruction statutes would not apply. Here, the president's concern about partisan polarization is close enough to a legitimate conception of the public interest that applying the obstruction statutes in such a case would threaten his ability to do what he thinks is best for the nation.

Intervening in an investigation to ensure the success of a diplomatic endeavor would also not constitute obstruction according to our standard. Suppose, for example, that the FBI is investigating someone for his possibly illegal financial ties to Russia, and it turns out that the president has also retained this person as an envoy to conduct sensitive back-channel negotiations. The president would be permitted to order the FBI to drop the case; such an action would be consistent with the president's role as commander-in-chief and the "organ of the nation in its external relations."<sup>179</sup> By contrast, suppose the person is not an envoy, but merely a friend or aide, and the president believes that if the investigation came to light, he would not be able to obtain the votes for a health care reform bill. Here, the national

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<sup>177</sup> See GARY L. GREGG II, *THE PRESIDENTIAL REPUBLIC: EXECUTIVE REPRESENTATION AND DELIBERATIVE DEMOCRACY* 30 (1997) (describing the "delegate-mandate" model of executive representation, which "requires the officeholder to be highly responsive to the wishes of his or her constituents").

<sup>178</sup> Dep't of Justice, Office of Public Affairs, *Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees* (Aug. 30, 2012), <https://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees>.

<sup>179</sup> *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 319 (1936).



security defense would not hold. Nor could the president legitimately defend himself on the ground that the health care reform bill was a worthy piece of legislation. Manipulating the conduct of criminal investigations in order to sway the outcome of congressional votes is flatly inconsistent with the norms of political competition and persuasion that undergird a constitutional democracy.

Our standard does not result in criminal liability for the president if the president personally benefits from decisions by lower-level officials, like the attorney general and the FBI director, not to prosecute or investigate cases. In the absence of an *actus reus*, there can be no liability. Note that the attorney general and the FBI director also cannot be liable merely for failing to bring a case unless some positive act can be identified—possibly, for example, ordering an end to a probe begun by a subordinate official, or destroying documents that might have assisted another investigator (such as Congress) with an inquiry into the same matter. Imagine, for example, that the FBI director refuses to investigate plausible claims that a family member of the president committed a crime. While an argument can be made that officials should be liable for omissions—for failures to comply with a positive official duty—we think that such a rule would interfere excessively with prosecutorial and enforcement discretion.

By contrast, Nixon clearly engaged in obstruction of justice because he interfered with investigations and proceedings that would have put him in legal jeopardy and generated embarrassing information—without any reason grounded in public policy or his constitutional responsibilities for doing so. The Clinton case is also straightforward. Since he interfered with a civil action and a grand jury investigation in order to protect himself from embarrassment, he obstructed justice. The firing of U.S. Attorney David Iglesias is on the line. If the facts are taken in their worst light, Bush or his top aides sought to speed up the prosecution of a Democratic politician for partisan reasons. However, merely firing U.S. attorneys because they are not loyal to the administration or likely to serve its priorities is not obstruction. The charge that President Reagan committed obstruction in the Iran-Contra affair seems to lack an *actus reus*. If the president had sought to hide evidence from congressional investigators regarding U.S. dealings with the Iranians or the Contra rebels, that would raise difficult questions about the line between the president's commander-in-chief role and Congress's foreign affairs powers.

Let us consider some examples taken, in abstract form because of ambiguities about the evidence at the time of this writing, from the recent turmoil in the Trump administration. A retired general who advised the president during a recently concluded campaign is accused of violating a provision of the Foreign Agents Registration Act by failing to disclose certain

payments he received from a foreign government. Violations of this provision have been prosecuted in the past but very rarely lead to prison sentences. The president believes that the retired general technically violated the law but that the violation was an oversight that resulted from the retired general's lack of familiarity with the relevant provision. The president believes that—in light of the retired general's decades of decorated service to the nation—the investigation is unfair and should end. The president orders an end to the investigation and threatens to fire the prosecutor pursuing the probe unless the case is dropped. This might be a case in which preemptively pardoning the retired general would be justifiable on grounds of mercy. (We discuss the pardon power at greater length in Section II.C.) But given the close political relationship between the president and the retired general, the presumption of regularity would not apply. It is, moreover, hard to see how the president's intervention can be justified on grounds of national security, or faithful execution, or the public good more generally. Under these circumstances, we think the president's purpose would be improper, and so his interference would amount to obstruction of justice.

Imagine, now, that the president's son is accused of violating a provision of the Federal Election Campaign Act by accepting an in-kind contribution from a foreign government. There is no recorded case of any other individual being prosecuted successfully for accepting such an in-kind contribution. Legal scholars are divided as to whether the statute applies to the son's conduct. A federal prosecutor begins an investigation targeting the son, and the president believes that the investigation is motivated by the prosecutor's own political inclinations. The president orders an end to the investigation and threatens to fire the prosecutor unless the case is dropped. This case is closer. The president has a responsibility to ensure that lower-level prosecutors do not misuse their power for political ends. On the other hand, the president is by no means a disinterested party here. He should recuse himself and allow, say, a high-ranking official at the Justice Department with a reputation for fair-mindedness to make the call. But we think that a court or a jury would likely—and appropriately—consider the president's purpose to be improper because of his personal stake in the case and the very loose link to the public interest.

What if instead the president intervenes in an investigation because he knows that it will reveal foreign interference in the last election and so will undermine respect for the outcome? The president might argue that popular confidence in presidential election results is an overriding national interest. Here, too, we think his defense should fail. It is difficult to accept the argument that a proper conception of the public interest entails hiding the fact of foreign infiltration in the American electoral process. Again, the case comes down to *mens rea* and to a judgment, informed by constitutional and

prudential considerations, as to whether the president's purpose for intervening in the investigation can possibly be characterized as proper.

In sum, historical examples and imaginative exercises generate easy cases as well as hard ones. The president who intervenes in an investigation to cover up sexual misconduct commits obstruction. The president who intervenes in order to hide the fact of sensitive back-channel communications that might bring peace to the Middle East does not violate the obstruction laws. No doubt the future will bring us new data points against which to test our suggested standard. Our purpose is not to resolve all questions but to provide courts with a starting point from which to work.

## II. COMPLICATIONS

### *A. Mixed Motives*

Our analysis in section I.D assumed a president acting on the basis of a single motive. The analysis becomes more complicated when the president's motives are multiple. Imagine that the president intervenes in an investigation both because he fears that it will bring to light information that might stymie a critically important diplomatic effort *and* because he fears it will reveal evidence that a foreign power meddled in the last election to bolster his own bid. How should a court—or how should Congress in the impeachment context—weigh the former (legitimate) purpose against the latter (improper) one?

Courts that have confronted the mixed motives problem in the context of nonpresidential obstruction have generally concluded that the mens rea requirement is satisfied “if the offending action was prompted, at least in part, by a ‘corrupt’ motive.”<sup>180</sup> As one court of appeals has held, “A defendant’s unlawful purpose to obstruct justice is not negated by the simultaneous presence of another motive for his overall conduct.”<sup>181</sup> A recent case of mixed motives serves to illustrate. A Philadelphia police officer was assigned to assist in a raid targeting a cocaine kingpin whose girlfriend was the sister of

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<sup>180</sup> *United States v. Howard*, 569 F.2d 1331, 1336 n.9 (5th Cir. 1978); *accord* *United States v. Brand*, 775 F.2d 1460, 1465 (11th Cir. 1985) (“[O]ffending conduct must be prompted, at least in part, by a corrupt motive.” (internal quotation mark omitted)); *see also* *United States v. Burke*, 125 F.3d 401, 404 (7th Cir. 1997) (per curiam) (“[D]efendant’s ‘altruistic’ motive . . . does not make it any less an obstruction” for purposes of sentencing enhancement); *United States v. Fayer*, 523 F.2d 661, 663 (2d Cir. 1975) (suggesting but not holding that “evidence of a bad motive or purpose . . . is sufficient to sustain a conviction even though a good motive is also present”); *State v. Maughan*, 305 P.3d 1058, 1062 (Utah 2013) (“[E]ven a mixed motive would still encompass a finding of specific intent to obstruct” for purposes of state obstruction of justice statute).

<sup>181</sup> *United States v. Smith*, 831 F.3d 1207, 1217 (9th Cir. 2016).

a childhood friend. The officer called the friend so that the friend could alert his sister of the impending raid. The officer was later charged with and convicted of obstruction of justice in violation of section 1505.<sup>182</sup> The Third Circuit affirmed, emphasizing that “[e]ven if [the officer]’s primary motivation was to extricate the sister of his childhood friend from a troubled situation, he still could have intended to obstruct the [drug] investigation to accomplish this goal.”<sup>183</sup>

Applying these mixed motives precedents by rote to the president would suggest that any improper purpose is enough to convict the president of obstruction. Yet such a rule would be unwise. Presidents often act for a mix of personal, partisan, and public-spirited reasons. Even when the president believes he is acting for the good of the nation, he might also have in mind the thought that his actions will raise his approval rating and thus improve his party’s prospects in the next election. While we think that the president who obstructs an investigation solely for partisan advantage commits the crime of obstruction, it would be absurd to say that the president commits the crime of obstruction whenever he exercises prosecutorial discretion with partisan politics in the back of his mind.

We suggest that a “but-for motive” rule makes more sense in the presidential obstruction context.<sup>184</sup> If the president would have taken the challenged action for national security reasons or in executing his responsibility to take care that the laws are faithfully executed, then that fact should immunize him from obstruction liability. The application of the obstruction statutes to the president should not prevent him from carrying out his constitutional role. However, if the president would not have taken the challenged action in the exercise of his constitutional functions, then he should not be able to claim an Article II immunity from obstruction liability. In that case, he should be treated like any other defendant, for whom a corrupt motive is enough for criminal liability even if that corrupt motive is not the exclusive rationale for action.

### *B. Implications of the Pardon Power*

So far, we have mentioned only in passing the president’s pardon power, which further complicates the analysis of presidential obstruction. Article II, section 2, clause 1 gives the president “Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”<sup>185</sup>

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<sup>182</sup> *United States v. Durham*, 432 F. App’x 88, 89 (3d Cir. 2011).

<sup>183</sup> *Id.* at 92 n.7.

<sup>184</sup> For a discussion, see Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. (forthcoming) (manuscript at 27).

<sup>185</sup> U.S. CONST. art. II, § 2, cl. 1.

The exception for cases of impeachment certainly means, at the least, that the president cannot save an official from impeachment by pardoning him. It might also mean that the president cannot pardon someone who has been impeached and convicted so as to save the ousted officeholder from criminal consequences.<sup>186</sup> With this one exception, the president's pardon power is plenary. As the Supreme Court said in the 1866 case *Ex parte Garland*, the pardon power "extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment." Moreover, the president's pardon power "cannot be fettered by any legislative restrictions."<sup>187</sup>

The existence of the pardon power raises two questions about presidential obstruction. The first is whether the president's exercise of the pardon power can ever itself constitute obstruction of justice. The second is whether the president's "greater" power to pardon gives him the "lesser" power to obstruct an investigation, as Professor Alan Dershowitz has argued.<sup>188</sup>

As for the first question, the relevant legal materials do not produce a clear answer. The Supreme Court suggested in the 1925 case *Ex parte Grossman* that misuse of the pardon power might be an impeachable

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<sup>186</sup> The best evidence for the latter view comes from a speech by future Supreme Court Justice James Iredell at the North Carolina ratifying convention. According to Iredell:

After trial [in the Senate] thus solemnly conducted, it is not probable that it would happen once in a thousand times, that a man actually convicted would be entitled to mercy; and if the President had the power of pardoning in such a case, this great check upon high officers of state would lose much of its influence. It seems, therefore, proper that the general power of pardoning should be abridged in this particular instance. The punishment annexed to this conviction on impeachment can only be removal from office, and disqualification to hold any place of honor, trust, or profit. But the person convicted is further liable to a trial at common law, and may receive such common-law punishment as belongs to a description of such offences, if it be punishable by that law.

3 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 107 (Jonathan Elliot ed., 1830) (statement of James Iredell).

<sup>187</sup> *Ex parte Garland*, 71 U.S. 333, 380 (1866).

<sup>188</sup> Alan Dershowitz, *History, Precedent, and James Comey's Opening Statement Show That Trump Did Not Obstruct Justice*, WASH. EXAMINER (June 8, 2017), <http://www.washingtonexaminer.com/alan-dershowitz-history-precedent-and-james-comeys-opening-statement-show-that-trump-did-not-obstruct-justice/article/2625318> ("The president can, as a matter of constitutional law, direct the attorney general, and his subordinate, the director of the FBI, tell them what to do, whom to prosecute and whom not to prosecute. Indeed, the president has the constitutional authority to stop the investigation of any person by simply pardoning that person.").

offense.<sup>189</sup> Alexander Hamilton said nearly 140 years earlier that a president who uses the pardon power to shield associates from prosecution for treason could be impeached and removed from office.<sup>190</sup> At the state level, Oklahoma Governor J. C. Walton was impeached and convicted in 1923 for selling pardons.<sup>191</sup> Governor Ray Blanton of Tennessee was forced to leave office early in 1979 amid similar allegations of pardon-selling in his administration.<sup>192</sup>

But to say that abuse of the pardon power is an impeachable offense is not the same as to say it is criminal. Indeed, one could say the opposite:

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<sup>189</sup> Ex parte Grossman, 267 U.S. 87, 106–08 (1925). *Grossman* involved a Chicago bootlegger who was convicted of contempt of court but pardoned by President Coolidge. The district judge ordered the defendant’s imprisonment notwithstanding the president’s pardon, reasoning that the pardon power did not extend to contempt charges. The Supreme Court rejected that argument. In a unanimous opinion, Chief Justice Taft wrote:

If it be said that the President, by successive pardons of constantly recurring contempts in particular litigation, might deprive a court of power to enforce its orders in a recalcitrant neighborhood, it is enough to observe that such a course is so improbable as to furnish but little basis for argument. Exceptional cases like this, if to be imagined at all, *would suggest a resort to impeachment* rather than to a narrow and strained construction of the general powers of the President.

*Id.* at 121 (emphasis added).

<sup>190</sup> Hamilton writes:

A President . . . , though he may even pardon treason, when prosecuted in the ordinary course of law, could shelter no offender, in any degree, from the effects of impeachment and conviction. Would not the prospect of a total indemnity for all the preliminary steps be a greater temptation to undertake and persevere in an enterprise against the public liberty, than the mere prospect of an exemption from death and confiscation, if the final execution of the design, upon an actual appeal to arms, should miscarry? Would this last expectation have any influence at all, when the probability was computed, that the person who was to afford that exemption might himself be involved in the consequences of the measure, and might be incapacitated by his agency in it from affording the desired impunity?

THE FEDERALIST NO. 69, at 419 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Jeffrey Crouch, *Presidential Misuse of the Pardon Power*, 38 PRES. STUD. Q. 722, 723 (2008) (noting that the expansiveness of the pardon power “was a general concern of the Anti-Federalists,” and that “Hamilton attempted to quell those concerns” in FEDERALIST NO. 69 by arguing that “despite the wide reach of the pardon power . . . the president would always be subject to impeachment if he ever acted improperly, even if he pardoned treasonous allies”).

<sup>191</sup> John Dinan, *The Pardon Power and the American State Constitutional Tradition*, 35 POLITY 389, 392 (2003).

<sup>192</sup> *See Ex-Tenn. Gov. Ray Blanton Dies*, WASH. POST (Nov. 23, 1996), [https://www.washingtonpost.com/archive/local/1996/11/23/ex-tenn-gov-ray-blanton-dies/3988bcc3-6671-41a8-8e9f-51b5954dca05/?utm\\_term=.922c0c6d5fea](https://www.washingtonpost.com/archive/local/1996/11/23/ex-tenn-gov-ray-blanton-dies/3988bcc3-6671-41a8-8e9f-51b5954dca05/?utm_term=.922c0c6d5fea).

that impeachment alone provides the remedy for abuse of the pardon power because of worries that criminalization would interfere with legitimate uses of executive power. In *Grossman* itself, the Supreme Court declined an opportunity to make an exception to the pardon power for criminal contempt of court because of the worry that such an exception would interfere with the president's executive discretion. This view is bolstered by a tradition of understanding the pardon power in the broadest possible terms, enabling presidents not only to pardon people who are unjustly convicted of breaking the law, or who deserve mercy because of extenuating circumstances. Numerous presidents have pardoned people for broad public policy purposes and even for reasons of narrow political expediency, to reward political supporters and allies.<sup>193</sup> If these types of pardons should be regarded as constitutionally proper, then "abuse" of the pardon power shrinks down to a very small subset.

Controversial pardons by recent presidents provide us with case studies. President Ford, who pardoned his predecessor Richard Nixon one month after taking office, justified his decision on the grounds that "the tranquility to which this nation has been restored by [Nixon's resignation] could be irreparably lost by the prospects of bringing to trial a former President," adding that Nixon had "already paid the unprecedented penalty of relinquishing the highest elective office of the United States."<sup>194</sup> Taking Ford's words at face value, the pardon of Nixon was motivated by the proper purposes of promoting the public welfare and granting mercy to a man who had already suffered severe punishment. While at the time there were calls for Ford's impeachment,<sup>195</sup> history has judged Ford more kindly.<sup>196</sup>

History's judgment has been less generous to President George H.W. Bush's decision to pardon former Defense Secretary Caspar Weinberger and several other Reagan administration officials for their role in the Iran-Contra affair.<sup>197</sup> When he granted those pardons on Christmas Eve 1992, less than a

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<sup>193</sup> See Todd David Peterson, *Congressional Power Over Pardon and Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225 (2003) (discussing abuse of the pardon and possible legislative responses).

<sup>194</sup> Proclamation 4311, 39 Fed. Reg. 32,601 (1974)

<sup>195</sup> See YANEK MIECZKOWSKI, *GERALD FORD AND THE CHALLENGES OF THE 1970S*, at 30-31 (2005).

<sup>196</sup> See, e.g., *Award Announcement: President Ford Receives John F. Kennedy Profile in Courage Award*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM (May 21, 2001), <https://www.jfklibrary.org/Events-and-Awards/Profile-in-Courage-Award/Award-Recipients/Gerald-Ford-2001.aspx> (honoring Ford with the Profile in Courage Award for making the "controversial decision of conscience to pardon former president Nixon and end the national trauma of Watergate").

<sup>197</sup> See, e.g., Crouch, *supra* note 190, at 730 ("The Iran-Contra pardons may represent the start of a new trend whereby presidents pardon not for traditional reasons of mercy or the public interest, but to protect their own personal interests.").

month before he left office, Bush appealed to considerations of mercy. Weinberger was, according to Bush, “a true American patriot” who had “rendered long and extraordinary service to our country” over the course of several decades, and who was now suffering from a “debilitating” illness while also caring for his cancer-stricken wife.<sup>198</sup> Bush’s suggestion that his pardons to Weinberger and others were intended to prevent “the criminalization of policy differences” carried somewhat less force: the independent counsel who doggedly pursued the Iran-Contra investigation was a lifelong Republican and an early supporter of Ronald Reagan.<sup>199</sup> There was widespread speculation at the time that the true motive for the pardons was to stall the independent counsel’s probe into Bush’s own wrongdoing—and in particular, to prevent the independent counsel from reviewing a diary kept by Bush that had recently surfaced.<sup>200</sup> Roughly half of respondents in a late 1992 Gallup poll said they thought Bush granted the pardons “to protect himself from legal difficulties or embarrassment resulting from his own role in Iran-Contra.”<sup>201</sup>

The only president who has been investigated for possible criminal charges arising out of a pardon decision is Bill Clinton (or, at least, his is the only case in which such an investigation has subsequently come to light). On his last day in office in January 2001, President Clinton pardoned the fugitive financier Marc Rich, after Rich’s former wife had donated \$450,000 to Clinton’s presidential library.<sup>202</sup> The FBI and the U.S. Attorney for the Southern District of New York later opened an inquiry into possible bribery, obstruction, money laundering, and related charges against Clinton,<sup>203</sup> and a federal grand jury in the Southern District of New York considered possible charges as well. The investigation lasted more than two years but did not result in an indictment.<sup>204</sup>

<sup>198</sup> Proclamation No. 6518, 57 Fed. Reg. 62,145 (1992).

<sup>199</sup> See Neil A. Lewis, Lawrence E. Walsh, Prosecutor in Iran-Contra Scandal, Dies at 102, N.Y. TIMES (Mar. 20, 2014), <https://www.nytimes.com/2014/03/21/us/politics/lawrence-e-walsh-iran-contra-prosecutor-dies-at-102.html>.

<sup>200</sup> See David Johnston, *Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails ‘Cover-Up,’* N.Y. TIMES, Dec. 25, 1992, at A1, <http://www.nytimes.com/learning/general/onthisday/big/1224.html>.

<sup>201</sup> Crouch, *supra* note 190, at 730.

<sup>202</sup> See James V. Grimaldi, *Denise Rich Gave Clinton Library \$450,000*, WASH. POST (Feb. 10, 2001), [https://www.washingtonpost.com/archive/business/2001/02/10/denise-rich-gave-clinton-library-450000/e0e10291-841a-4e38-893e-d500ee4a5b30/?utm\\_term=.13860212e0b1](https://www.washingtonpost.com/archive/business/2001/02/10/denise-rich-gave-clinton-library-450000/e0e10291-841a-4e38-893e-d500ee4a5b30/?utm_term=.13860212e0b1).

<sup>203</sup> See Josh Gerstein, *Comey ‘Enthusiastic’ About Bill Clinton Probe in 2001, FBI Memo Says*, POLITICO (Jan. 18, 2017), <http://www.politico.com/story/2017/01/james-comey-fbi-bill-clinton-233808>.

<sup>204</sup> See *FBI Records: The Vault: William J. Clinton Foundation*, FED. BUREAU OF



In an op-ed published a month after the pardon, Clinton gave several justifications for his decision, including that other financiers who engaged in similar transactions had faced only civil penalties, and that two well-respected tax experts had defended Rich's reporting position.<sup>205</sup> Clinton also noted that "many present and former high-ranking Israeli officials of both major political parties and leaders of Jewish communities in America and Europe urged the pardon of Mr. Rich because of his contributions and services to Israeli charitable causes, to the Mossad's efforts to rescue and evacuate Jews from hostile countries, and to the peace process through sponsorship of education and health programs in Gaza and the West Bank."<sup>206</sup> This foreign policy rationale might be characterized as a claim that "the public welfare will be better served" by the granting of the pardons,<sup>207</sup> which—if believed—would exonerate President Clinton of obstruction (though perhaps not of bribery).

The investigation into Clinton suggests that, at least as of the early 2000s, federal prosecutors and law enforcement officials were not convinced that the pardon power gave the president absolute immunity for any exercise of executive clemency. How might this view be squared with *Ex parte Garland*'s expansive description of the pardon power? One possible interpretation is that Congress cannot limit the effect of a pardon that has been granted, but that criminal law can still apply to the grantor. Indeed, we think that it is difficult to reject this interpretation unless one believes that a president who sells pardons is immune from criminal liability—and we know of no one who maintains that view.

Regardless of whether a president can commit the crime of obstruction by granting a pardon, that does not resolve the separate question of whether the president's pardon power immunizes him from criminal liability for interfering in an investigation under other circumstances. Dershowitz argues that the greater power to pardon includes the lesser power to drop investigations. But while the greater power to pardon does bring some lesser powers with it (such as the power to commute a heavier sentence to a lighter one<sup>208</sup> and the power to remit a fine<sup>209</sup>), Dershowitz's claim that the

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INVESTIGATION, <https://vault.fbi.gov/william-j.-clinton-foundation> (last visited July 11, 2017).

<sup>205</sup> William Jefferson Clinton, Op-Ed, *My Reasons for the Pardons*, N.Y. TIMES (Feb. 18, 2001), <http://www.nytimes.com/2001/02/18/opinion/my-reasons-for-the-pardons.html>.

<sup>206</sup> *Id.*

<sup>207</sup> See *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

<sup>208</sup> See *id.* at 486–88 (holding that the president has the power to commute a sentence regardless of whether the convict consents).

<sup>209</sup> See *The Laura*, 114 U.S. 411, 413–14 (1885) ("[E]xcept in cases of impeachment and where fines are imposed by a co-ordinate department of the government for contempt of its authority, the President, under the general, unqualified grant of power to pardon offences

pardon power includes the power to block an investigation crumbles under scrutiny.

First, setting aside the issue of whether the president violates the law when he grants a pardon for an improper purpose, there remains substantial doubt as to whether the president has the power to *self-pardon*. And if the president lacks the “greater” power to self-pardon, then presumably he also lacks the “lesser” power to obstruct an investigation of which he is a target. The text of the Constitution does not answer the question of whether the president can self-pardon,<sup>210</sup> and the structure of the Constitution arguably suggests that he cannot. As noted above, provisions in other articles and amendments appear to reflect a norm against self-dealing that is baked into the American system of government<sup>211</sup>—a norm that, if applied broadly, would call the validity of self-pardons into question. It was on this ground that the Office of Legal Counsel concluded in the run-up to Nixon’s resignation that a President cannot pardon himself.<sup>212</sup>

Further evidence against the validity of self-pardons comes from the debate at the Constitutional Convention over the pardon clause. After Edmund Randolph raised a concern that the president could use the pardon power to shield himself from prosecution for treason, James Wilson responded: “If [the President] be himself a party to the guilt he can be impeached and prosecuted.”<sup>213</sup> As Brian Kalt argues, this response suggests “an assumption by Wilson that self-pardons were invalid.”<sup>214</sup> After all, if the president could self-pardon, then Wilson’s assurance that “he can be impeached and prosecuted” would have been empty.

The strongest argument against the claim that the president’s

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against the United States, may remit fines, penalties, and forfeitures of every description arising under the laws of Congress.”).

<sup>210</sup> As Brian Kalt notes, a pardon might be defined as “an ‘act of grace’ visited on an inferior by his superior,” which would suggest that a pardon necessarily involves a grantee who is separate from the grantor. BRIAN C. KALT, *CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES* 44 (2012). But Kalt also acknowledges that other definitions of “pardon” do not appear to contemplate a bilateral arrangement, and Founding-era sources are unclear on this point. *See id.* at 44-45.

<sup>211</sup> *See supra* notes 164-168 and accompanying text; *see also* Brian C. Kalt, Note, *Pardon Me: The Constitutional Case Against Presidential Self-Pardons*, 106 *YALE L.J.* 779, 794-96 (1996). On the other hand, one might argue that the fact that the Constitution lays out specific prohibitions against self-dealing signals that there is no such general rule; otherwise, the specific prohibitions would be unnecessary. *Cf. supra* note 97 (noting Bork’s argument regarding the inference to be drawn from legislative immunity provisions).

<sup>212</sup> *See Presidential or Legislative Pardon of the President*, I SUPPLEMENTAL OPINIONS OF THE OFFICE OF LEGAL COUNSEL 370, 370 (Aug. 5, 1974) (“Under the fundamental rule that no one may be a judge in his own case, the President cannot pardon himself.”).

<sup>213</sup> 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 626 (Max Farrand ed., 1911).

<sup>214</sup> *See* Kalt, *supra* note 211, at 788.

“greater” pardon power includes the power to self-pardon derives from the exception in cases of impeachment. If, as suggested above,<sup>215</sup> this exception means that a pardon is ineffective both as a bar to impeachment and as a bar to criminal consequences after impeachment and removal, then the president does not have an unfettered power to protect himself from prosecution. To be sure, a self-pardon in the waning days of a presidential term might shield the outgoing president from criminal consequences as a practical matter. But until the possibility of impeachment is eliminated, the prospect that the president might be held criminally liable for offenses that are also impeachable remains at least technically on the table.

An alternative rebuttal to the “greater includes the lesser” argument posits that the power to publicly pardon a suspect is not greater than—but different from—the power to intervene covertly in an investigation. Professor Maxwell Stearns has made this point in response to Dershowitz: a pardon, according to Stearns, would be “out [in] the open, subject to media scrutiny and challenge,” and thus the president could be “held politically accountable.”<sup>216</sup> This rebuttal rests on the assumption that pardons are necessarily public—an assumption that is not necessarily correct. Chief Justice Marshall said in the 1833 case *United States v. Wilson* that a pardon is a “private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court.”<sup>217</sup> Though *Wilson* itself did not involve a secret pardon, Marshall’s statement calls into question the claim that a pardon necessarily differs from obstruction in its publicity.

And yet still, the distinction between public-facing pardons and surreptitious obstruction might serve to undermine the “greater includes the lesser” argument here. The holding in *United States v. Wilson* is that for a pardon to negate an indictment, conviction, or sentence, the defendant must be pleaded in court.<sup>218</sup> So even if a pardon can be granted in secret, it does little good for the grantee unless he brings it out into the public. The holding in *Wilson* and the constitutional requirement for public trials in criminal cases<sup>219</sup> arguably ensure that pardons ultimately must be made public if they

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<sup>215</sup> See *supra* note 186.

<sup>216</sup> Max Stearns, *Two Strikes for Alan Dershowitz: Why Donald Trump Is Not Exempt from Investigation for Obstruction of Justice*, BLINDSPOT (June 10, 2017), <https://www.blindspotblog.us/single-post/2017/06/10/Two-Strikes-for-Alan-Dershowitz-Why-Donald-Trump-is-not-Exempt-from-Investigation-for-Obstruction-of-Justice>.

<sup>217</sup> *United States v. Wilson*, 32 U.S. 150, 160–61 (1833).

<sup>218</sup> See *id.* at 161–63.

<sup>219</sup> See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”); *Globe Newspaper Cty. v. Superior Court*, 457 U.S. 596, 603 (1982) (recognizing that “the press and general public have a constitutional right of access to criminal trials” and that “this right of access is embodied in the First

are to have any effect at all.

To sum up: It is possible that the president can avoid criminal liability for obstruction of justice by pardoning the target of an investigation rather than by ordering subordinates to drop the case. But it is simply not clear that this is the case. If, as we think, the president could be convicted of the crime of bribery if he pardoned someone in return for a bribe, then we cannot rule out the possibility that he could be convicted of obstruction of justice if he pardoned someone in order to block an investigation for reasons untethered to his constitutional and legal authority. But even if the president commits no obstruction of justice in the criminal sense by using the pardon power, it remains possible for him to commit the crime of obstruction of justice if he does not use the pardon power and instead orders subordinates to drop investigations or prosecutions.

### *C. Can the President Be Indicted While in Office?*

The entire question of presidential obstruction of justice might seem idle if the president cannot be convicted of a crime, as some commentators have claimed.<sup>220</sup> However, there are several reasons why criminal liability can make a difference. First, the claim that a sitting president cannot be convicted of a crime while in office does not represent settled law. Second, even if a president cannot be convicted of a crime while in office, it may be possible to convict him after he leaves office of a crime he convicted while in office. Third, even if a president cannot be convicted of a crime committed while in office, he may be impeached for such a crime. Below, we briefly discuss each of these points.

The only authoritative legal analysis of the first claim comes from the executive branch itself. In 1973, the Office of Legal Counsel in the Justice Department issued an opinion that the president could not be indicted or prosecuted while in office.<sup>221</sup> Later that year, the solicitor general argued to a court in connection with grand jury proceedings against Vice President Spiro Agnew that, while the vice president was subject to criminal process,

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Amendment”). The fact that courtrooms can be closed under certain circumstances does not undermine the claim that, as a general matter, criminal proceedings occur in the open, and so the *Wilson* rule ensures that in most cases a pardon must be pleaded in public for it to be effective.

<sup>220</sup> See, e.g., Adam Liptak, *A Constitutional Puzzle: Can the President Be Indicted?*, N.Y. TIMES (May 29, 2017), <https://www.nytimes.com/2017/05/29/us/politics/a-constitutional-puzzle-can-the-president-be-indicted.html>

<sup>221</sup> Memorandum from Robert G. Dixon, Jr., Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, Regarding the Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office 29 (Sept. 24, 1973), <http://www.fas.org/irp/agency/doj/olc/092473.pdf>.

the president was not.<sup>222</sup> In 2000, the OLC revisited the question, and concluded that its earlier opinion was correct.<sup>223</sup>

As the OLC acknowledges, there is no textual or historical basis for the claim that the president is immune to criminal process.<sup>224</sup> The impeachment judgment clause says that a party who is impeached is also “liable and subject to” criminal process, implying that an impeached president could be convicted for the crime that led to impeachment. This was also the view expressed by Alexander Hamilton in the Federalist Papers. No other textual or historical source suggests that the president is immune to criminal process.<sup>225</sup>

In *Clinton v. Jones*, the Court rejected the argument that the president should be immune to *civil* process.<sup>226</sup> The OLC accordingly rests its argument for immunity on general “structural principles,” claiming that criminal prosecution of the president would put an excessive burden on him and interfere with his constitutionally prescribed role. Several Supreme Court cases, decided after the 1973 opinion, are roughly consistent with this view.<sup>227</sup> They acknowledge that because of the president’s unique role in the

<sup>222</sup> Memorandum for the United States Concerning the Vice President’s Claim of Constitutional Immunity (filed Oct. 5, 1973), *In re Proceedings of the Grand Jury Impaneled December 5, 1972* (D. Md. 1973) (No. 73-965).

<sup>223</sup> Randolph D. Moss, *A Sitting President’s Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222 (2000), [http://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olcv024-p0222\\_0.pdf](http://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olcv024-p0222_0.pdf).

<sup>224</sup> *Id.* at 224 (citations omitted).

<sup>225</sup> For what it’s worth, an opinion letter from constitutional law professor Ronald Rotunda, requested by independent counsel Kenneth Starr in 1998, concluded that “President Clinton is subject to indictment and criminal prosecution, although it may be the case that he could not be imprisoned . . . until after he leaves office.” Mem. from Ronald D. Rotunda, Univ. of Ill. Coll. of Law, to Kenneth W. Starr, Independent Counsel, at 1 (May 13, 1998), available at <https://www.nytimes.com/interactive/2017/07/22/us/document-Savage-NYT-FOIA-Starr-memo-presidential.html>. Rotunda’s memo reserved judgment on whether a President could be indicted “for allegations that involve his *official* duties as President,” such as allegations arising out of a “policy dispute between the President and Congress.” *Id.* at 2. Starr’s successor as independent counsel, Robert Ray, ultimately decided not to pursue an indictment against Clinton, but Ray’s decision came after Clinton left office and was not based on whether a sitting president could be prosecuted. See ROBERT W. RAY, FINAL REPORT OF THE INDEPENDENT COUNSEL—IN RE: MADISON GUARANTY SAVINGS & LOAN ASSOCIATION—REGARDING MONICA LEWINSKY AND OTHERS 41-49 (released Mar. 6, 2002) (stating that “sufficient evidence existed to prosecute [Clinton] and that such evidence would probably be sufficient to obtain and sustain a conviction by an unbiased trier of fact,” but that “alternative sanctions”—including the suspension of Clinton’s law license, fines and settlement payments totaling more than \$965,000, and “substantial public condemnation”—were “adequate substitutes for criminal prosecution”).

<sup>226</sup> *Clinton v. Jones*, 520 U.S. 681, 692 (1997).

<sup>227</sup> See Moss, *supra* note 223.

constitutional scheme, criminal process cannot be applied to him in the same way that is applied to ordinary citizens and other public officials. However, these opinions suggest a case-by-case approach rather than blanket immunity. Courts should take account of the president's role when deciding whether and how he should be subject to process. The OLC's conclusion that the president should receive blanket immunity from criminal process does not follow.<sup>228</sup> To be sure, it is possible to believe that criminal process will interfere with the president's duties, whereas civil process will not, but we doubt that such a broad generalization can be upheld. A judge can manage a criminal proceeding so that it puts as little burden on the president as a civil proceeding does, and can suspend any prison sentence until the end of the president's term.

By contrast, there is no uncertainty as to whether a former president can be convicted of a crime committed while in office. The impeachment judgment clause explicitly recognizes that he can, and the OLC agrees.<sup>229</sup> There are good policy reasons for such a view. Post-tenure proceedings would not interfere with presidential duties, but the prospect of criminal liability may deter a president from breaking the law. This alone justifies our inquiry into whether the obstruction of justice statute applies to the president.

Finally, the question of criminal liability matters because of the role it may play in an impeachment. The impeachment clause says that the president and other public officials can be impeached for and convicted of "Treason, Bribery, or other high Crimes and Misdemeanors."<sup>230</sup> There are different views about the meaning of this clause. The reference to "crimes" may imply that impeachment can occur only if the official has committed a crime.<sup>231</sup> However, another possible view is that a president can be

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<sup>228</sup> The OLC briefly mentions *Mississippi v Johnson*, 71 U.S. 475 (1866), which suggests that courts are not permitted to issue injunctions against the president in his personal capacity. While this case and other cases suggest there are limits on judicial authority over the president, their continuing validity is in doubt in light of more recent cases in the Supreme Court and below, and they in any event do not address criminal liability. See Laura Krugman Ray, *From Prerogative to Accountability: The Amenability of the President to Suit*, 80 KY. L.J. 739, 756 (1992).

<sup>229</sup> Memorandum from Randolph Moss, Assistant Att'y Gen., Office of Legal Counsel, to the Att'y Gen., Whether a Former President May Be Indicted and Tried for the Same Offences for Which He Was Impeached by the House and Acquitted by the Senate (Aug. 18, 2000), <https://www.justice.gov/file/19386/download>.

<sup>230</sup> U.S. CONST., art. II, § 4.

<sup>231</sup> See Jerome S. Sloan & Ira E. Garr, *Treason, Bribery, or Other High Crimes and Misdemeanors*, 47 TEMP. L.Q. 413, 430 (1974) ("On the eve of President Johnson's indictment, Dwight . . . asserted that '[t]he decided weight of authority is that no impeachment will lie except for a true crime . . .'" (quoting Theodore W. Dwight, *Trial by Impeachment*, 6 AM. L. REGISTER 257 (1867))). But Sloan and Garr go on to rebut Dwight's assertion. *Id.* at 430-440.

impeached for purely “political” reasons—if he loses the confidence of Congress—even if he does not commit a crime.<sup>232</sup> An intermediate view is that the president can be impeached only for crimes and for certain political acts that achieve a certain threshold of significance.<sup>233</sup>

Whatever the correct view, we think it important that in both the Nixon and Clinton cases, the drafters of the articles of impeachment took care to note that the president had committed a “crime” in some of the articles. In both cases, articles that did not cite a crime were later dropped.<sup>234</sup> At a minimum, some members of Congress may not be willing to vote for impeachment or conviction unless a serious underlying crime can be identified. For that reason, it is important to determine whether a president can commit the crime of obstruction of justice.

#### *D. Canon of Constitutional Avoidance*

We have acknowledged that applying the obstruction statutes to the president poses difficult questions of a constitutional dimension. That, one might argue, is sufficient to trigger the canon of constitutional avoidance—the principle that “courts should try to interpret statutes so as to avoid raising difficult questions of constitutional law.”<sup>235</sup> If interpreting the obstruction

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<sup>232</sup> See Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 185 (2007) (quoting 116 CONG. REC. 11913 (daily ed. Apr. 15, 1970) (statement of Rep. Ford)) (“When trying to get William O. Douglas impeached in 1970, Ford, then House Minority Leader, claimed that ‘an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body [the Senate] considers to be sufficiently serious to require removal of the accused from office.’” (alteration in original)).

<sup>233</sup> This was the view expressed by Charles Black in his classic monograph on impeachment, see CHARLES BLACK JR., *IMPEACHMENT: A HANDBOOK* (1974), and it seems to be Sunstein’s view as well. See Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 284–285 (1998). The proposed article of impeachment of Nixon for tax fraud was rejected in part because “even if [it] were proved, it was not the type of abuse of power at which the remedy of impeachment is directed.” *IMPEACHMENT OF RICHARD M. NIXON*, *supra* note 2, at 223.

<sup>234</sup> One proposed article of impeachment in the Nixon case charged that he had violated his oath of office and disregarded his duty under the Take Care Clause by concealing bombing operations in Cambodia. This article was rejected 26–12 by the House Judiciary Committee. *IMPEACHMENT OF RICHARD M. NIXON*, *supra* note 2, at 217–19. In the Clinton case, one of the proposed articles made similar charges: that the president had violated his oath of office and disregarded his duty under the Take Care Clause. *IMPEACHMENT OF WILLIAM JEFFERSON CLINTON*, *supra* note 138, at 14. This proposed article was passed out of the House Judiciary Committee but was not one of the articles of impeachment eventually passed by the House of Representatives. See H.R. Res. 611, 105th Cong. (1998).

<sup>235</sup> Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331, 331 (2015).

statutes so that they apply to the president raises difficult constitutional questions, that is reason enough to interpret the obstruction statutes so that they do not.

This argument gains support from the Supreme Court's 1992 decision in *Franklin v. Massachusetts*.<sup>236</sup> The Commonwealth of Massachusetts sued President George H.W. Bush and two other federal officials, claiming that the Bush administration had miscalculated Massachusetts's population following the 1990 census in a way that reduced the state's delegation to the U.S. House of Representatives by one. Massachusetts charged that the administration's calculation violated the Administrative Procedure Act (APA),<sup>237</sup> which provides that courts "shall . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>238</sup> The Supreme Court rejected Massachusetts's argument, holding that the APA does not apply to the president. As Justice O'Connor wrote for the majority:

The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.<sup>239</sup>

Might the same logic apply to the obstruction laws? After all, the relevant statutes do not say explicitly that they reach the president. This argument may seem attractive insofar as it would allow a court to avoid—or, at least, delay—reconciling the obstruction statutes with the principle of presidential prosecutorial discretion. The court would in effect be saying that if Congress wants the obstruction statutes to apply to the president, it must say so explicitly. But we do not think that the argument can carry the day. First, the Supreme Court has said that the canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a provision," and that the canon "has no application in the absence of ambiguity."<sup>240</sup> In *Franklin*, the relevant statute was arguably ambiguous: the

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<sup>236</sup> 505 U.S. 788 (1992).

<sup>237</sup> *See id.* at 790-91.

<sup>238</sup> 5 U.S.C. § 706.

<sup>239</sup> *See Franklin*, 505 U.S. at 800-01.

<sup>240</sup> *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (alterations and internal quotation marks omitted); *accord* *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015); *Clark v. Suarez Martinez*, 543 U.S. 371, 381 (2005); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001).



term “agency”—while defined expansively in the APA<sup>241</sup>—is not a word that one usually uses to describe a single individual such as the president. Here, by contrast, it is difficult to read “whoever” to mean anything other than whoever. Interpreting the word “whoever” to mean “whoever, except the president” does violence to the statutory language in a way that the canon of constitutional avoidance neither requires nor allows.

Second, the constitutional avoidance argument sketched out above comes into conflict with the holding in *United States v. Nixon*,<sup>242</sup> in which the Supreme Court applied Rule 17(c) of the Federal Rules of Criminal Procedure to a sitting president. That rule provides, in relevant part, that “[a] subpoena may . . . command the person to whom it is directed to produce the books, papers, documents or other objects designated therein.”<sup>243</sup> Rule 17(c) does not say that “a subpoena may command the person to whom it is directed, *including the president*,” to produce the designated documents or objects. Notwithstanding the absence of any explicit reference to the president, the Justices unanimously concluded that the district court acted “consistent with Rule 17(c)” when it denied President Nixon’s motion to quash a subpoena for Oval Office tape recordings.<sup>244</sup> And while the Supreme Court’s opinion in *United States v. Nixon* did not mention the canon of constitutional avoidance, it is difficult to square that decision with the proposition that statutes do not apply to the president unless they specifically say so.

Third, and finally, every member of Congress who addressed the question of whether the obstruction laws apply to the president during the Nixon and Clinton impeachment proceedings concluded that they do.<sup>245</sup> We are not aware of any other instance in which any lawmaker has expressed the contrary view. Applying the canon of constitutional avoidance would, at most, compel Congress to recodify the proposition that the president cannot interfere with the due administration of justice—a proposition that senators and representatives have accepted for decades without doubt.

## CONCLUSION

While Trump’s recent firing of James Comey motivated this article, the question whether the president can obstruct justice as a constitutional matter is likely to stay with us for a long time. Trump is the ninth president since Nixon. Of these nine presidents, serious accusations of obstruction have been

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<sup>241</sup> See *Franklin*, 505 U.S. at 800 (citing 5 U.S.C. §§ 701(b)(1), 551(1)).

<sup>242</sup> 418 U.S. 683 (1974).

<sup>243</sup> *Id.* at 698 (quoting Fed. R. Crim. Proc. 17(c)).

<sup>244</sup> *Id.* at 702.

<sup>245</sup> See *supra* notes 131-132, 139-144, and accompanying text.

leveled against six of them or their top aides—Nixon, Reagan, George H.W. Bush, Clinton, George W. Bush, and now Trump. We can be sure that this question will remain with us for some time to come. Yet as far as we know, before Nixon, exactly zero of the previous 36 presidents were placed in legal or political jeopardy because of an obstruction of justice allegation. Not even Andrew Johnson was accused of obstruction of justice, even though his failure to enforce Congress' Reconstruction policies could have been described as just that, and even though the crime of obstruction had been defined by statute for more than three decades by that point. What accounts for this significant change in public attitudes?

We speculate that the answer lies in the concurrent expansion of presidential power and federal criminal and civil law. Presidents have vastly more resources at their disposal to advance their agendas than they did in the past, thanks to the rise in the funding and staffing of the executive branch. Congress has also delegated presidents immense power by passing broad and frequently vague laws that regulate many areas of life, including a great deal of political behavior (raising money, conducting campaigns) as well as generic laws relating to tax, business, and the like. Laws of both types can ensnare the president's rivals. This means that presidents can strengthen their position in government through selective prosecution of their political opponents, along with selective non-prosecution of their aides and supporters. Under these circumstances, elections cannot exert much discipline on presidents, while the impeachment process is cumbersome at best. Courts can normally intervene only at the request of the executive branch, which is controlled by the president. Presidents seem unconstrained.

But it turns out that the presidents are vulnerable to an institution that was not foreseen by the founders as a check on presidential power: the immense and prestigious legal and investigative bureaucracy. Both as a practical matter and as a product of post-Watergate concerns about presidential abuse, these powerful agencies enjoy considerable political autonomy from the president. These institutions can and do, on their own, bring investigations when the president's abuse of power implicates the law, or entangles the president's aides in legal wrongdoing. When they do, the president is put to the choice whether to try to block the investigation or permit it. The agencies appear to enjoy enough trust among the public that if the president blocks an investigation, he will pay a political price.

All of this suggests that the 186 year-old obstruction of justice law has, in the decades since Watergate, evolved into a major check on presidential power. This check is often vigorously enforced by law enforcement authorities who are nominally under the president's control but who—as a matter of norms and practice—have come to enjoy functional independence. While scholars have for a long time pointed out that the

executive branch contains “internal checks” that may block the president from abusing power,<sup>246</sup> the particular form that we have identified has attracted little notice. Yet as compared to other internal checks, such as the influence of the Justice Department Office of Legal Counsel and of the various agency inspectors general, this one—with the threat of criminal liability that comes with it—is perhaps the most potent.

The question is whether this institutional development should be celebrated or bemoaned. The answer is not an easy one because both theory and historical experience tell us that investigators and prosecutors can abuse their power just as the president can. J. Edgar Hoover’s abuse of power at the FBI led to greater political control over that agency. The perceived abuse of the powers of the independent counsel led to its abolition. But the controversies surrounding Trump have revived memories of Watergate, which was the reason why the independent counsel statute was enacted in the first place. The pendulum may be set to swing in the other direction. That may be for the better: the president ought not stand above the criminal law. But when laws are vague and law enforcement authorities are independent, the risk on the opposite side is that all presidents will permanently be under investigation even when they do nothing wrong. Unless we think carefully about how the criminal law can be harmonized with the president’s constitutional responsibilities, we again run the risk that the pendulum may swing too far.

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<sup>246</sup> For a recent statement, see JACK L. GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012).